THE LAW OF TITHES;

SHEWING

Their Nature, Kinds, Properties and Incidents; by whom, to whom, when, and in what Manner payable; how, and in what *Courts* to be ſued for and recovered; what Things, Lands or Perſons are charged with, or exempted therefrom. With the Nature, Incidents and Effects of Cuſtoms, Preſcriptions, Real Compoſitions, *Modus Decimandi*, Libels, Suggeſtions, Prohibitions, Conſultations, Cuſtom of *London*, &c.

WHEREIN

All the Statutes and adjudged Caſes relative to the Subject are introduced and conſidered.

The Second Edition corrected.

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In the *SAVOY*:

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PREFACE.



THE PREFACE.

IT *has been often ſaid, That* Truth, *the* Law, *and the* Common Good, *will never want* Advocates *to defend them: How far* that *may be* verified *at this Day, we ſhall* not *undertake to* prove: *But it muſt be* confeſs'd, *That nothing leſs than* theſe *were the* Motives *for* our Author's *undertaking and finiſhing the* enſuing Diſcourſe.

He had thoroughly Read *and* Conſidered *all thoſe* Authors *who have formerly Written of* Tithes, *and found them* groſly Deficient *in what relates either to the* Aſcertaining *the* Legal Rights *thereof, or the Method and* Means *of* Recovering *thoſe* Rights.

That the Great *Mr.* Selden *has given us only a mere* Hiſtory *thereof, and that confined to* remoter Times.

That Spelman, Montague, Tilleſly, *and others, bewildred their Readers with* Perplex'd Ideas *of the* Jus Divinum.

That Sir S. Degg, *(tho' of good Knowledge in our* Common Law) *attributes too much to the* Canon Law *and* Eccleſiaſtical Courts.

That the late Reverend Mr. Watſon *is too* Partial *to his own* Order; *and throughout his*

Book *endeavours to reſtrain the* Authority *of the* Common Law *and the* Temporal Courts.

That Mr. Godolphin, *Mr.* Hughes *and Mr.* Shepherd's *Treatiſes on this Subject, tho' indeed* impartially *wrote, and with ſome* Judgment, *yet the* Matters *and* Caſes *therein contained are ſo* Imperfectly *and* Immethodically *related, That moſt* Readers *at this Day are at a* loſs *to underſtand them. Nor do any of them contain the* Tenth Part *of the* Law *concerning* Tithes, *as it ſtands with us at this Day.*

To remedy theſe Inconveniencies, our Author *has here collected not only all the* Statutes, *and ſuch* adjudged Caſes, *as have been publiſhed relative to* that Subject; *but has alſo* (*as he conceives*) illuſtrated *many* Points *which have hitherto appeared* Doubtful; *and* diſtributed *the whole into ſuch an* Order *and* Method, *as will not only aſſiſt in the clearing up of ſuch* Difficulties *as occur; but alſo very much contribute to fix a more* laſting Impreſſion *of each* ſeveral Point *in the* Reader's Memory. *To which* End *he is deſired in the* firſt Place *to peruſe the following* Contents.

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THE Law of TITHES, &c.

CHAP. I.

Of the Original of Tithes, and when eſtabliſhed in England; *a Deſcription of Tithes, Parſonages, Vicarages, Appropriations, Glebe Lands, Oblations, Obventions; and of the ſeveral Kinds, Natures, Qualities, and Incidents of Tithes in general, with a Word of the* Jus Divinum *thereof; and of what, and in what Caſes no Tithes are due, with a Summary of the Statutes relating to Tithes.*

Tithes, their Original.

THE Intent of the enſuing Treatiſe being to ſhew how the Law of this Kingdom at preſent ſtands, with Reſpect to Tithes, and the Incidents there-

of; it may ſeem needleſs to make any ſtrict Inquiſition into the Original of Tithes, or to deduce an hiſtorical Narration thereof, from the earlier Practice of the Chriſtian Church down to our Times; eſpecially for that the Curious and Inquiſitive may receive abundant Satisfaction in thoſe Particulars, from the learned Labours of *Hoſpinian*, *Grotius*, *Spelman*, *Ridley*, *&c.* and that incomparable Treatiſe of Mr. *Selden*, written on this Subject.

Vide Hoſpin. de Orig. bonorum Eccleſiaſticor'. Seld. Hiſt. of Tithes, &c. Ridley's View, &c.

'Twill therefore be ſufficient in this Place to obſerve, That as no ſuch Thing as an Eccleſiaſtical Benefice was in Being in the earlier Times of Chriſtianity; ſo there could at that Time be no Fruits or Effects thereof, or any Incidents appurtenant thereto, *viz.* Tithes, Glebe, *&c.*

Not known in the primitive Church.

For as Biſhop *Barlow*, *Selden*, and others have obſerved, neither Tithes nor Eccleſiaſtical Benefices, (which are *correlata* in their Nature) were ever heard of for many Ages in the Chriſtian Church, and as that Biſhop affirms, no Mention is made of *Tithes* in the grand *Codex* of Canons, ending in the Year 451; which, next the Bible, is the moſt authentick Book in the World; and that it thereby appears, during all that Time, both Churches and Churchmen were maintain'd by free Gifts and Oblations only. See *Watſon's Compleat Incumbent*, *p.* 3, 4, *&c.*

Barlow's Remains, *p.* 169. Selden of Tithes 82.

Hoſpin. ſupra, &c.

And as it may be prov'd from good Authority, That by the antient Practice here in *England*, Patrons of Churches did originally either grant the ſame by Donation only, or (which is of like Kind) confer them

Vide 3 Salk. 169. Seld. of Tithes 86, &c.

on



on their Clerks by Collation and Livery in like Manner (as they ſtill do to Free Chapels and Donatives) and continued ſo to do till that Right was extorted from 'em by Papal Canons and Decretals: So thoſe Patrons had during that Time, *i. e.* in the 7th and 8th Century, the ſole Power over, and Right of Diſpoſal of the Tithes of their own Lands: And it is held to be then the general Practice for any Man to give or pay his Tithes to what Church he thought fit, till the Council of *Lateran* (or *Lyons*) reſtrained that Practice.

Originally payable ad libitum. Seld. ibid. 198, 204, 209, &c.

And Mr. *Selden* has ſhewn us, That Tithes were not eſtabliſhed here in *England*, till towards the End of the eighth Century, *i. e. Circ. Annum* 786, when Pariſhes and Eccleſiaſtical Benefices came to be ſettled; for as is ſaid, Tithes and Eccleſiaſtical Benefices being *correlata*, the one could not exiſt without the other; for whenever any Eccleſiaſtical Perſon had any Portion of Tithes granted to him out of certain Lands, this naturally conſtituted the Benefice, the Granting of the Tithes of ſuch a Manor or Pariſh being in Fact a Grant of the Benefice; as a Grant of the Benefice did imply a Grant of the Tithes: And thus the Relation between Patrons and Incumbents was analogous to that of Lord and Tenant by the feudal Law. But Tithes with us at this Day are eſteemed to be rather the Fruits and Effects of the Benefice, than the Benefice it ſelf; and may therefore very properly be deſcribed as the chief Part of the Fruits or Profits of a Parſonage, Rectory, or Eccleſiaſtical

When eſtabliſhed in England, Seld. ut ſupra.

Tithes and Benefice correlata. Vide Watſon, *p.* 4.

Tithes deſcribed.

Benefice belonging to the Parſon, Vicar, or Incumbent of a Church (excluſive of Glebe Land and other Perquiſites).

Defined. Pridle *and* Napper's *Caſe* 11 Co. 13. Dyer 84.

In ſome of our Law-Books Tithes are briefly defined to be an Eccleſiaſtical Inheritance or Property in the Church, collateral to the Eſtate of the Lands thereof; but in others more fully, a certain Part of the Fruit or lawful Increaſe of the Earth, Beaſts, or Men's Labours, which in moſt Places, and of moſt Things, is the tenth Part, which by the Law hath been given to the Miniſters of the Goſpel, in Recompence of their attending their Office. But *note*; theſe ſeveral Definitions ſeem to reſpect the ſeveral Capacities of the Parſon Incumbent, *i. e.* Eccleſiaſtically Political, or legally Perſonal.

Parſon, what, and why ſo denominated.

Now the Word Parſon in a legal Acceptation is taken for the Rector of a Church parochial, and is denominated *Perſona Eccleſiæ*, becauſe he taketh upon him the Parſonage, *i. e.* the Care of Perſonating or Repreſenting the Church; and therefore he is ſaid to be ſeized *Jure Eccleſiæ*, (as a Huſband is *Jure uxoris*) ſo that in his Perſon, the Church may ſue for and defend her Rights, *&c.*

Alſo, when a Church is full, it is ſaid to be *plena & conſulta* of ſuch a one *Parſon* thereof, *i. e.* full and provided of a proper Perſon or Repreſentative, or one who may *Vicem ſeu Perſonam Eccleſiæ gerere*; and ſuch a one is called *Perſona imperſonata*, or Parſon imperſoned, that is, a Rector or Patron in Poſſeſſion of a Church parochial, whether

Perſona Imperſonata.

the

the ſame be Preſentative or appropriate; and the Tithes and Revenues of ſuch a Church is commonly call'd a *Parſonage*. *Parſonage.*

A *Vicar* is one that has a ſpiritual Promotion or Living under the Parſon, and is ſo denominated *quaſi vice agens Parſonæ*. And ſuch a Promotion or Living is called a *Vicarage*, which is a Part or Portion of the *Parſonage* allotted to the Vicar for his Maintenance and Support. *Vicar and Vicarage.*

This Part or Portion is in ſome Places an annual Sum of Money certain; but in moſt Places it is a Part of the Tithes in Kind, which moſt commonly is the ſmall Tithes; and in ſome Places he has a Part of the great Tithes, and alſo of the Glebe, and ſuch a one is called a *Vicar endowed*. *His Maintenance.* *Vicar endowed.*

Thus he that has the Right to, and Poſſeſſion of the leſſer Part, is called the Vicar; and he that has the other and greater Part of the Tithes, *&c.* is call'd the *Parſon*, who in ſome Pariſhes is a Clergyman, and ſometimes the Miniſter or Incumbent of the ſame Church; but in other Places he is a mere Layman, and cannot ſupply the Church but by a Spiritual Vicar; and this ſo poſſeſs'd by a Layman is called an *Impropriation*, and himſelf the *Impropriator*. 1 *Keb.* 906. *Lay Impropriations.*

But an *Appropriation* is when ſuch a Parſonage (or Vicarage, or other Church Preferment) is in the Hands or Poſſeſſion of ſome Eccleſiaſtical Perſon and his Succeſſors, and can be made only to a Body Politick or Corporation Spiritual, that hath Succeſſion, whereby ſuch Body becomes perpetual In- *Appropriations to Bodies ſpiritual.*

cumbent of the Benefice appropriated, and ſhall for ever enjoy the Tithes and other Profits, and the Cure of Souls belonging thereto.

Difference in Churches appropriate and not appropriate.

And there is no Difference between a Church appropriate and one not appropriate, ſaving the former is annex'd to the Corporation or Perſon to whom 'tis appropriated, and his or their Succeſſors for ever; but a Church not appropriate is had only for the Life of the Incumbent thereof. And therefore thoſe who have Appropriations can no more grant their Title of Appropriation to others, ſo as to make the Grantees perpetual Incumbents thereof as Appropriators, than Incumbents of other Churches preſentable, can by their ſole Act convey their Incumbencies to others; but both may equally make Leaſes of the Profits thereof, *i. e.* of the Tithes, Glebe Lands, *&c.* And note; an Appropriation will not paſs by the Name of an Advowſon. *Watſon* 90.

Incumbents of both may make Leaſes.

See *Watſon's Compleat Incumbent*, *chap.* 17. for a fuller Explication of Appropriations, Vicarages endowed, *&c.*

Glebe Lands.

The Fruits or Profits of a Parſonage or Vicarage, beſides the Tithes, are Glebe Lands, (where there are ſuch, for in ſome Places there are none) Oblations, Obventions, and other Perquiſites on Marriages, Baptiſms, *&c.* and in ſome Places *Mortuaries.*

What they are. Watſon 404, 405.

The *Glebe* is that Portion of Land, Meadow or Paſture that belongs to, and is Parcel of the Parſonage or Vicarage over and above the Tithes; and ſuch Glebe, while in the Hands of the Parſon, is not to pay Tithes to the Vicar. But if the Parſon lets

lets his Rectory, reſerving the Glebe, he ſhall pay Tithes to his Leſſee; and if he ſell the Corn ſown on the Glebe, the Vendee ſhall pay Tithe; alſo Glebe Lands in another Pariſh ſhall pay Tithe.

Oblations. *Oblations*, *Obventions* and *Offerings*, ſeem in their proper Nature to be one and the ſame Thing, and that which of old was the only Maintenance of the *Church*; and being then the *free Gifts* of the People, were truly eſteemed a ſpiritual Revenue; and theſe are ſtill called *merely Spiritual.* Whereas Tithes and Glebe Lands are in our Law taken as a Temporal Revenue; but in the Canon Law, the Word *Oblations* comprehends all ſuch Things, either real or perſonal, as were given to the Church by Teſtament, or otherwiſe; and this, though Real and *Temporal*, they improperly term *Spiritual.* Ibid. 56, 575.

Obventions. And by the Term *Obventions*, the Canoniſts included not only Oblations, Offerings, Mortuaries, and Perquiſites of Marriages, Baptiſms, Funerals, *&c.* but alſo divers other Particulars, which are now happily aboliſhed or grown *ex uſu.*

Offerings. But Offerings which are uſually given at *Eaſter* or *Whitſontide*, *&c.* ſeem in their Nature to be a Kind of perſonal Tithe, being in ſome Places claimed by Cuſtom, and received as a Right or Debt, and not as a free Gift; and accordingly are now paid, as of Duty, and not of Benevolence. *Vide poſt* 27. the Stat. 2, 3 *Ed.* 6.

Mortuaries. Of Mortuaries, *vide poſt* Chap. 4.

Tithes of three Kinds.

Now all Tithes, according to a general Diviſion, are reducible to three Kinds, *viz.* Predial, Perſonal, and Mixt.

1. *Predial.* Vide poſt. chap. 2.

Firſt, Predial Tithes, *i. e.* ſuch as accrue or ariſe from the yearly Fruits, Profits, or Produce of the Earth, as Corn, Grain, Beans, Peaſe, Graſs, Hay, Wood, *&c.* the Seed and Profits of Rape, Hemp, Flax, Annis, Cummin, Parſley, Fennel, Hops, Saffron, Woad, *&c.* of Herbs, Mint, Rue, Sage, Woad, *&c.* And the Fruits, Apples, Pears, Plums, Cherries, Figs, Grapes, Nuts, Filberds, Acorns, Maſt, *&c.* and the like.

2. *Perſonal.* Vide chap. 4.

Secondly, Perſonal Tithes, *i. e.* ſuch as ariſe and grow due by the Profits that proceed from the honeſt Labour and Induſtry of Mankind in ſome perſonal Work, Imployment, Artifice, or Negotiation, as Buying, Selling, Merchandizing, or the manual Labour, Art, or Occupation of Carpenters, Joiners, Maſons, Taylors, Fiſhers, Fowlers, Hunters, or the like; and for this Tithe there is generally claimed the tenth Part of the clear Profits that they make by their reſpective Trades, Arts or Imployments; but this is only paid by Cuſtom, and in ſome Places, and cannot be extended to ſuch as hunt, fiſh, fowl, *&c.* for their Pleaſure only.

3. *Mixt.* Vide chap. 3.

Thirdly, The third Kind of Tithes are ſaid to be *mixt*, for that they participate in their Nature both of predial and perſonal Qualities, *i. e.* ſuch as ariſe partly from the Earth or Land, where the Thing or Animal is produced, bred or fed; and partly from the Labour and Care of Man in their raiſing, breeding or feeding; of which Sort are Cattle,

tle, as young Calves, Lambs, Kids, Roes, Pigs, the Wool of Sheep, Milk and Cheeſe of Cows (*quære* of Sheep and Goats) and the Eggs and Chickens of Hens, Geeſe, Ducks, Swans, and the like.

Two Kinds of predial Tithes greater and leſſer. Watſ. 589.

But it is to be obſerved, that among predial Tithes, ſome of them are ſaid to be great Tithes, as Corn, Grain, Hay, Wood, Trees, and the like; and ſome of them are denominated minute or ſmall Tithes, as the Tithes of Herbs, Flax, Hempſeed, and the like; and the Diſputes that ariſe touching either of theſe, do generally terminate in theſe or the like Queries, *viz.*

Queſtions touching Tithes. Quære Plowd.

Whether they are of *Sylva cædua*, i. e. of Woods felled and preſerved to grow again, or of Wood not for Uſe, or apt for Timber, but for the Fire. If of Trees planted for fencing of Grounds, or in Fields, Paſtures, or Hedge-rows; of Turves growing in Fenniſh and Mooriſh Ground, or of Paſture Ground. If it be Tithes of Harveſt Fruits, or not, of Hay of the firſt Cut or After-Mouth, of Wool, of Lambs, of Calves, of Pigs, of Colts, of Milk, of Cheeſe, of Seeds, of Hemp, Flax, Onions, Rape, Pot-herbs, of Maſt of Beech, or Oak, of Wind or Water Mills, of Parks, Warrens, Pools, Ponds, of wild Beaſts under Cuſtody, *&c.* of Dovecotes, of Bees, of Huntings, Fowlings, of Swans, Geeſe, Eggs, of Crafts, Trades, and manual Occupations; of Negotiating, Merchandizing, Trafficking, *&c.*

Their Nature and Qualities.

Under theſe general Heads eſpecially will fall many of thoſe Caſes which hereafter follow in the Treatiſe. For the better underſtanding

ſtanding whereof, and to ſhew the Nature and Quality of Tithes in general, we ſhall here lay down the general Rules and Maxims following, *viz.*

None for Houſes.

1. That Tithes are not due or to be paid for the yearly Rent, or Value of Houſes, but for the Revenue and Increaſe of Things; for Tithes in Kind cannot be thereof, and a Preſcription for a *Modus Decimandi* can hardly ſtand to riſe and fall according to the Rent thereof; yet that kind of Payment in Lieu of Tithes is good in *London* and other Places by Cuſtom, and by ſeveral Acts of Parliament, which ſee hereafter.

Hob. 11.

Perſonal Tithes not of common Right.

2. That Tithe naturally and properly is but the Tenth of the Revenue, Produce or Profits of my Ground, and not of my Labour and Induſtry, *Hob.* 250. From hence we may collect, that perſonal Tithes are not due naturally or of common Right.

Vide Poſt. 12. Rep. Can. 353.

3. That in Caſes of Tithing, the Cuſtom of the Place is much to be heeded, both for the Matter and the Manner thereof.

4. That Tithes are Lay Chattels, for the Recovery whereof the King and others may have Remedy by our Temporal Law, and in our Lay Courts.

5. That Tithes are grantable from Man to Man, as other temporal Things are.

6. That were the Tithe may be divided from the Reſidue (as in Graſs, *&c.*) it ought to be ſo done; though this is not to be done in Corn, except in Sheaves.

7. That the Parſon or Vicar is to take away his Tithes in a convenient Time after they are ſet forth. And if he ſuffer them

to

to lye on the Land to the Prejudice of the Owner of the Ground, he may have his Action on the Caſe againſt him for it. *Ley* 70.

8. But though Tithes are now become a Lay Chattle, yet by our Law they are accounted an Eccleſiaſtical Inheritance, and collateral to the Eſtate of the Land out of which they iſſue; and that of common Right they are to be paid out of all Lands, Meadows and Paſtures; alſo by the Eccleſiaſtical Laws they were originally due to Eccleſiaſtical Perſons only. But ſome good Authors, as Mr. *Selden* and others obſerve, that this Law did not exclude the Laity from having a Propriety in Tithes. *Tithes an Eccleſiaſtical Inheritance.*

'Tis alſo ſaid, that 'till they were ſevered they remained merely Eccleſiaſtical, (*i. e.* under the ſole Cognizance of the Eccleſiaſtical Court) for the Subſtraction whereof no Remedy was given by the common Law; but this is now provided for by Statute Law. *No Remedy for Subſtraction at common Law.*

Alſo, That no Union of Poſſeſſion could extinguiſh or ſuſpend them; but that they remained ſtill *in Eſſe*, and might be Demiſed or Let to any ſpiritual Perſon. *Not extinguiſhed by Union.*

And if a Parſon impropriate had enfeoffed another of part of his Glebe, or had made a Leaſe of it to him, yet he ſhould have had Tithes thereof ſtill; ſo that a Man might have had Tithes even againſt his own Feoffment; for they were not claimed in Reſpect of any Ownerſhip in the Land, but as was ſaid *Ex debito* by the Law of God (being at *that Time* eſteemed merely ſpiritual). *Who to have them.* *Formerly ſpiritual.*

So

So if a Parſon at this Day purchaſe Land within his Rectory, and afterwards Leaſes the Parſonage, the Leſſee ſhall have Tithes of this new purchaſed Land.

Alſo, by Reaſon of their ſpiritual Nature, a mere Layman by the common Law could not have had an Inheritance deſcendable or grantable in Tithes, as he might of temporal Poſſeſſions; neither will they at this Day paſs by the ſame Words in Grants, as other temporal Poſſeſſions will do; for even at this Time, if one grants a Ground or Land *cum proficuis & commoditatibus eidem pertinentibus*, the Tithes will not paſs.

How paſſed, &c.

Note. Law, altered by Statute.

But here we muſt obſerve, that the Law has now changed the former ſpiritual Qualities of Tithes and other Eccleſiaſtical Duties, eſpecially ſuch as came to the Crown by the Statutes of 27 *H.* 8. 31 *H.* 8. 1 *Ed.* 6. For by theſe Statutes, and the Statutes 32 *H.* 8. *c.* 7. 2 & 3 *Edw.* 6. and 1 & 2 *P. & M.* Such Tithes, *&c.* in the Hands of Laymen are mere temporal Inheritances, and are of the Nature of other Lands and Chattles; they ſhall be Aſſets in the Hands of an Heir; the Wife ſhall be endowed thereof, and the Husband be Tenant by the Curteſy. Real Actions (in the Courts at Common Law) may be brought for them, and they have all other Incidents of Temporal and Lay Inheritances. See 1 *Co.* 3. 11 *Co.* 13. *Dyer* 34. *Co. Lit.* 5. 159.

Now meerly temporal. Rep. Can. 353.

Hob. 42.

Alſo *Hobart* admits, That when Tithes *in kind* are actually diſcharged or extinguiſhed by a *Modus Decimandi*, they are turned into a Lay Fee, but ſays, that that which is given

And a Lay Fee.

ven in Lieu of Tithes is turned into a ſpiritual Fee; which Saying may well be queried, ſeeing not only Tithes, but whatever is given in Lieu of Tithes, is now become a Lay Fee, or Temporal Intereſt as aforeſaid.

And the Law and Practice is now clear, that if any Layman that has Tithes be diſſeiſed of them, or wronged in them, or they be kept or detained from him, he having a lawful Intereſt in them, or Right to receive them, he or his Heirs or Executors, *&c.* may have his Remedy for them by the ordinary Way of Action or Suit in the King's temporal Courts of Law or Equity. And although the other Remedy of ſuing for Tithes in the Eccleſiaſtical Courts, is not taken away by any Statute, but permitted to be made uſe of as before; yet the Suing for them in a Spiritual Court can never denominate the Thing itſelf to be Spiritual, ſeeing the Spiritual Law and the *Jus divinum* itſelf was originally created, and is ſtill regulated and controuled by the ſuperior Authority of the common and Statute Law, which under God and the King is the beſt Security of all Sacred as well as Civil Rights, Liberties, Properties and Poſſeſſions.

Their Jus divinum.

It is true, there is a *Jus divinum* in all legal Rights and Properties, and whatever any Man rightfully poſſeſſes, his Title to it is *Jure divino*, which does not exclude or vary from the Law of Man. But the *Jus divinum* of Tithes is ſaid to have derived its Stream from the ſulphureous Fountain of the Canon Law, and projected by the Canoniſts,

Projected by Canoniſts.

Selden's *Table Talk*, verbo *Tithes.*

noniſts, in order to exclude the Authority of the Temporal Law from intermedling with what they called God's Portion; which tho' given by Laymen, yet as they argue and pretend, being once veſted in the Church, they could never be reſumed or applied to any Lay Uſe by any Humane Law, or Temporal Power whatſoever.

The Conſequences thereof.

From this Project aroſe thoſe various Conteſts between the Courts Spiritual and Temporal touching Tithes and other Eccleſiaſtical Claims, which we often meet with both in our Hiſtories and Books of Law; (ſome whereof you will hereafter find referred to in the Chapter of Prohibitions, *&c.*) which ended in a Reſtraint of Eccleſiaſtic Juriſdiction.

Prohibitions, &c.

For the Clergy deriving their Claim of Right from God, and endeavouring to appropriate the ſole Cognizance and Juriſdiction of that Claim to their own Courts (commonly called ſpiritual) put the temporal Courts under a Neceſſity of examining the Foundation of that Juriſdiction, and conſequently the Juſtneſs of the Claim, by interpoſing Writs of Prohibition, *&c.*

Theſe politick Projects in the Caſe of Tithes, and their ill Conſequences, ſeem to be admitted, cenſured, and lamented, even by one of the greateſt Advocates of that *Jus Divinum*, viz. Biſhop *Mountague*, who writes thus:

Diatriba, p. 48.

'But for *Tithes*, there was perhaps a 'Fault in Clergymen themſelves, who be-'ing not contented with God's Allowance, 'nor the Part and Portion he had ſet out for 'them;

'them, but aiming at more and a far greater 'Proportion than they thought that would 'riſe unto, they diſclaimed their (moral) 'Title and Intereſt themſelves; and ſo fell 'off from Morality in the Matter of *Tithes*, 'into Judiciality for their own Advantage, '(as they hop'd) ſuppoſing, as indeed the '*Caſe* then ſtood, and as the Truth was, 'that whereas they (the Clergy) had all 'Men's Heads under their Girdles in Tye 'of Conſcience; ſo for the moſt part they 'might command what they liſted from 'them, and therefore would not reſt upon 'a Tenth, when they thought it in their 'Power to command a Fifth; ſo the Dog 'in the Water loſt the Fleſh in his Mouth 'by catching at the Shadow he ſaw there; 'and thoſe who would be wiſer (by Pro-'jects) for the Church than God, while 'they left his Allotment to make way for 'greater Largeſs, ἐμωρὰνθησαν, they proved 'ſtark Fools in their new Devices, and ſo 'came at length to be diſpoſſeſſed of that 'which was their Right, being reſtrained 'and held to their Dimenſion, a Portion, a 'Penſion, a Pittance, a poor Salary, *&c.* 'who, had they been wiſe and underſtood 'theſe Things, might have kept themſelves 'well enough (had they not aimed to feed) 'at Rack and Manger (of *Jus Divinum.*')

The Neceſſity of Prohibitions.

And that Laymen and the Temporal Courts were under Neceſſity of making uſe of thoſe Remedial and Reſtringent Writs, in order to cure the Exorbitancy of their *Jus Divinum*, will appear from thoſe frequent Inſtances found in our Books, where

their Suits in the Spiritual Courts are founded on that Claim, though contrary to Law, Reaſon and good Conſcience.

Unreaſonable Claims, &c.

And that the Claims of Churchmen in the Caſe of Tithes, and other their Demands, were often unjuſt and unreaſonable, will further appear both from the Preambles, and the enacting Clauſes of many of our Statutes; to ſelect a few for Inſtance.

Statutes Reſtraining the ill Practices of the Clergy.

The Statute 13 *E.* 1. *c.* 5. giving Remedies to redreſs the Uſurpations of Advowſons, (chiefly practiſed by the Clergy) and alſo upon an *Indicavit* brought againſt an Incumbent (practiſed by their Colluſion in order to ouſt the rightful Patron) giving the Patron (in ſuch Caſes) a Writ of Advowſon for the Tithes, *&c.* See *F. N. B.* 30 *E.* 35 *B.* 31 *F. &c.* 39 *E.* 3. 15. 13 *E.* 4. 3. 5 *Co.* 102. 7 *Co.* 25, 27. *&c. Vid. Stat.* 7 *Annæ*, *c.* 18.

The Statute 9 *E.* 2. (or *Articuli cleri)* c. 1. of Clergymens ſelling their Tithes for Lucre of Gain, and turning them into Lay Chattles for ill Purpoſes, *vid. Reg.* 34, 36. *F. N. B.* 40. *&c.* and 50. 2 *Inſt.* 619.

The Statute 9 *E.* 2. *(idem)* cap. 5. ſhews their unreaſonable Claim of the Tithes of new Mills. See 2 *Inſt.* 621.

The Statute 45 *E.* 3. declares their unjuſt Demand of the Tithes of Timber-Trees, in the Name of *Sylva Cædua.* See 2 *Inſt.* 642. 11 *Co.* 48. *Cro. Eliz.* 1, 477, 736. *Cro. Jac.* 100, 133. 2 *Leon.* 80.

With divers other Statutes reſtraining other miſchievous Practices pretended to be founded on their *Jus divinum:* Vide 9 *H.* 6.

56. 50 *E.* 3. 10. 43 *E.* 3. 33. 11 *H.* 4. 8. *Fitz. Attachment, ſur Prohibition* 1 *Bro. Diſms* 14, *&c.* (*Quære Plow.* 470.)

Tithes not due for Things that increaſe not.

It may alſo be here obſerved, that our Books of Common Law do mention certain Caſes wherein no Tithes are due of Common Right, but yet are claimed as due by the Eccleſiaſtical or Canon Law, *Jure divino.*

And in the firſt Place, by our Law, no (predial) Tithes ſhall be paid of ſuch Things which do not increaſe from Year to Year. For the Rule is, *ubi non eſt annua Renovatio ibi Decimæ don debent ſolvi.*

Therefore no ſuch Tithes ſhall be paid for Stone, got out of Quarries; nor for Pit-Coals, Turfs, Slates, Bricks, Tyles, Earthen Pots, nor of any Thing made of Earth. 2 *Mod.* 77.

Nor of Marle, Sand, Lime, Chalk, or other Thing uſed for the Improvement of Ground; for by theſe the Earth, and conſequently the Tithes thereof, are bettered and improved. See 1 *Mod.* 35. 1 *Mod.* 35.

Nor for any Thing gotten out of the Ground, as Tin, Lead, Copper, or other Metal. Nor is Tithe-Ore due of common Right. See 1 *Chan. Ca.* 272, 282. 2 *Vern.* 46.

And yet by Cuſtom, Tithes of ſuch Things may be due and payable.

Where Tithes are due of common Right, and where by Cuſtom, ſee 4 *Mod.* 341, 344.

See alſo for this Purpoſe theſe ſeveral Authorities, 1 *Roll. Abr.* 636. *D.* 1 *Moor* 908. *Cro. El.* 277. 2 *Inſt.* 651. *Dr. & Stud.* 174. 2 *Vern.* 46. *Cumberb.* 404. 6 *Mod.* 223. 1 *Lev.* 179.

No Tithes ſhall be paid of Aftermowths, or of Stubbles, or Rakings of Corn, *i. e.* where it is done without Fraud. *Quære* 1 *Rol. Abr.* 640. *Moor* 910. *St.* 2 *E.* 6. *c.* 13.

No Tithes ſhall be paid of Broom, Gorſe, or Furze uſed for Fewel within the Pariſh.

And by ſome Books no Tithes are due *de Communi jure*, for any Wood or Underwood. *Vide* Chap. 3.

Nor ſhall any Tithes be paid of Birds or Beaſts that are *Feræ Naturæ*, *&c.* unleſs they be ſold. See 1 *Rol. Abr.* 640. *Lit. R.* 311. *Moor* 909.

Nor for Hounds, Apes, Parrots, and the like; becauſe only Things of Pleaſure. 2 *Inſt.* 651.

Nor for Fiſh or Coneys of Common Right; *contra* by Cuſtom. 1 *Cro.* 247. *March* 56. 6 *Mod.* 223.

Alſo Servants in Husbandry ſhall not pay perſonal Tithes. *Vid. Degg* 265.

Nor ſhall Tithes be paid of Marriage Goods, *ibid.*

And it ſeems conſonant to Reaſon, that Beaſts uſed in Husbandry ſhould pay no Tithes.

Alſo Tithes regularly are not due of Dwelling-Houſes, yet a *Modus* may be due for a Houſe as well as for Land; but it ſhall be intended a *Modus* for the Land before the Houſe was built. See 11 *Co.* 16. *Hob.* 11. and yet I conceive, if the Houſe be burnt or deſtroy'd, no Tithes ſhall be paid for the Land.

The

The Tithe of all tame and domeſtick Fowls, is to be paid either in their Eggs, or in their Young in proper Kind, *viz.* *Tame Fowls.*

The Tithe of Geeſe, Ducks, and Swans, are uſually paid in their proper Kind, and of Hens and Turkeys, commonly in their Eggs; But herein the Cuſtom of the Place muſt be obſerved. *Eggs.*

And Note, where they pay Tithe of the Eggs, there is no Tithe paid of the Young; and *e converſo*, no Tithe of the Eggs, where they pay Tithe of the Young.

So where there is Tithe-Milk there is no Tithe-Cheeſe, *& e converſo*, *&c.* *Milk.*

It is alſo made a Queſtion whether any Tithes are due for Mills or not; which *Cooke* in his *Second Inſtitutes* ſays, was never judicially determined that he knew of. And that it had been held in Caſe of a Fulling Mill, that no Tithe was due. For of Profits that come only by the Labour and Induſtry of Man, no Tithe is to be paid, and the ſame Reaſon holds for Corn-Mills. See 2 *Inſt.* 622. *Litt. Rep.* — *Cro. Car.* 523, 524. *Vide poſt Chap.* 4. this Point debated. *Mills.*

Alſo no Tithes are to be paid for the Wool-locks, Neckings, Tailings, or Birlings of Sheep. See 1 *Rol. Abr.* 645, 646. *Cro. El.* 363. *Moor* 911. 3 *Bulſ.* 242. *Wool-locks.*

No Tithes for green Tares given to Horſes, *&c.* See and note 2 *Leon. Caſe* 30. *Green Tares.*

Not payable by a Pariſhioner for Fewel ſpent in his Houſe. *Cro. El.* 609.

Nor for Timber-Trees, or intended for ſuch, or above 20 Years Growth, or ſuch as are *aridæ & Putridæ.* 2 *Plow.* 470. *Cro. El.* 477.

Nor for Cattle brought up for the Pail or Plough. *Cro. El.* 702.

Nor for Pidgeons, *&c.* unleſs by ſpecial Cuſtom. 2 *Mood.* 77.

Nor for a Riding Nag, *i. e.* kept for Pleaſure and not for Profit. *Pop.* 126. *Hetley, Thornhill's* Caſe.

Lands in the King's Hands. Lands in a Foreſt, while they are in the King's Hands, are free from paying Tithes, although they lie within ſome Pariſh: But if they are diſforeſted, and come to the Hands of another, they ought to pay Tithes. For the not paying Tithes for them whilſt they were in the King's Hands, and were Foreſt Lands, is but an Immunity during that Time, but is no abſolute Diſcharge. *Sed Quære?* See *Lilly's Reg.* 575.

Lands Improved. If Lands paid no Tithes before the Statute of *E.* 6. or but very inconſiderable, and afterwards the Lands for which the Tithes are paid, are improved by the Owner, he ſhall only pay the accuſtomed Tithes uſually paid before the Improvement of them, *viz.* ſuch Tithes as were paid for them immediately preceding the Improvement. But if no Tithes at all were paid for them before the Improvement, no Tithes ſhall be paid for them after the Improvement. For the Improvement of Land not Tithable by Law, cannot make it Tithable; for this were to alter the Law. *ibid.* See the Stat. 2, 3 *E.* 6. *c.* 13. See 5, 6.

Tithes not Jure Divino. And it is there ſaid to be held by the Court of King's Bench in *Michaelmas* Term 1649. That Tithes are not due to be paid *Jure Divino*, but *per Legem Terræ. ibid.*

And that the Reader may have the clearer Idea of the Rights of Tithes, &c. *as they formerly ſtood and at preſent ſtand on the Foot of our Temporal Laws, we ſhall here ſubjoin a brief Summary, or Abſtract of all ſuch Statutes or Acts of Parliament which have been enacted relating thereto, from the 13th Year of* Edw. 1. *to the preſent Time,* viz.

Stat. 13 *Ed.* 1. (commonly called *Weſtminſter* 2*d*) *Cap.* 5. *Sect.* 4. That if on an *Indicavit, &c.* the Parſon (incumbent) be diſturbed of his Tithes, the Patron ſhall have a Writ to demand the Advowſon of Tithes; and when that is tried (at Common Law) the Plea or Sentence in the Spiritual Court ſhall paſs as it is tried (or according to the Judgment) of the King's Court. See *Poulton's Stat. pag.* 2, 3. and *plus pag.* 223. *b.*

Stat. 34 *Ed.* 1. *(De conjunctim Feoffatis)* For that Pleas in Courts Spiritual, have heretofore had many Times unmeet Delays, for that Writs of *Indicavit* were often brought before the Judges of ſuch Matters when they were begun; and thereupon our Chief Juſtices could not proceed lawfully, nor in due Manner award a Writ of Conſultation on ſuch Manner of Proceſs. It is *agreed* (not enacted) that ſuch Writ of *Indicavit* ſhall not be granted till the Matter be recorded in the Spiritual Court, and the Chancellor certified thereof. See *Keeble's Stat. p.* 71. 31 *H.* 6. 13. *Regr.* 35. *F. N. B.* 30. A. and 45. C.

Stat. 9 *Ed.* 2. *(Articuli Cleri) Cap.* 1. *&* 2. In Caſes of *Tithes, Oblations, Obventions* and

Mortuaries, (when propounded under thoſe Names) the King's Prohibition ſhall hold no Place, although for the long with-holding the ſame, they come to a Pecuniary Eſtimation, and Sentence for the ſame. But if a Clerk or Religious Man do ſell his Tithes in the Barn, *&c.* for Money, and that be demanded before a Spiritual Judge, a Prohibition lies. For by the Sale they are made Temporal Chattles. See *Poulton*'s *Stat.* 323. B.

Stat. Idem, *Cap.* 2. Alſo if Debate does ariſe upon the Right of Tithes, having its Original of the Right of the Patronage, and the Quantity of the ſame Tithes does paſs the Fourth of the Goods of the Church, a Prohibition holds place. *Vide ib.* And ſee 2 *Inſt.* 619. *F. N. B.* 40. *&* 50.

Stat. idem, *Cap.* 5. Alſo if any Man erects in his Ground a new Mill, and the Parſon of the Place demands Tithes, a Prohibition is prayed to iſſue, but denied in the Anſwer. *Vid. ibid. & quære.* See 2 *Inſt.* 621.

Stat. 18 *E.* 3. *Cap.* 7. That no Writ of *Sci. Fac.* ſhall be granted out of Chancery againſt Prelates and Clerks, for Payment of Tithes, *&c.* ſaving the Right which the King and his Anceſtors uſed to have. See *Keeble* 110. *F. N. B.* 30. E.

Stat. 45 *E.* 3. *Cap.* 3. A Prohibition to go to the Spiritual Court, if the Tithes of Wood of twenty Years or upwards be ſued for there, as Tithes of *Sylva Cædua.* See *Poulton* 121. *Keble* 151. *Reg.* 44. *F. N. B.* 54. B. 50 *E.* 3. 10. 11 *H.* 4 8. 9 H. 6. 56. *Fitz. Attach. ſur Probib.* 1. *Bro. Diſmes* 14. 11 *Co.* 48. *Plow.* 470. *Cro. El.* 1, 477, 736. 2 *Leon.* 80.

Stat.

Stat. 1 *R.* 2. *Cap.* 13. That Eccleſiaſtical Judges ſhall not be vexed for retaining Suits for Tithes, *&c.* in a Spiritual Court. See *Keeb.* 154, 155. *Stat.* 13 *E.* 1. *Cap.* 22.

Stat. idem, *Cap.* 14. That on a Suit in the Spiritual Court for Tithes taken away, a general Averment to the contrary ſhall not be taken, without ſhewing Specially how the ſame was a Lay Chattle. See *Keeb.* 155.

Stat. 2 *H.* 4. *Cap.* 4. That the Diſcharge of Tithes to the *Ciſtertians*, by the Pope's Bull, is void, and it is a *Præmunire* to put it in Execution. *Keeb.* 192.

Stat. 5 *H.* 4. *Cap.* 11. That Tithes ſhall be paid by Farmers of Aliens Lands, notwithſtanding the Seizure into the King's Hands, or any Prohibition. *Keeb.* 202. *Reg.* 179.

Stat. 7 *H.*4. *Cap.* 6. That he who purchaſes the Pope's Bull for a Diſcharge of Tithes, and thereby diſturbs the Enjoyment of them by any Parſon, *&c.* ſhall incur a *Præmunire*. *Keeb.* 204. See *Stat.* 13 *E.* 2. 13 *R.* 2. and 2 *H.* 4.

Stat. 27 *H.* 8. *Cap.* 8. *Sect.* 1. That Tenths or Tithes ſhall be deducted out of Firſt Fruits on Spiritual Promotions. *Keeb.* 456.

Stat. idem, *Sect.* 2. and 3. That the Commiſſioners for Firſt Fruits ſhall allow them. *Ibid.* And that the Incumbent ſhall (after Tenths allow'd) pay them, *&c.*

Stat. 27 *H.* 8. *Cap.* 8. *Sect.* 4. That the Succeſſor ſhall pay the Firſt Fruits, if he may diſtrein Goods of the Predeceſſor, elſe the Predeceſſor's Executor only liable. See the *Stat.* 5 *Ann. c.* 24.

Stat. 27 *H.* 8. *Cap.* 20. *Sect.* 1. That in Suits for Tithes, *&c.* Two Juſtices *Quorum unus*, at the Requeſt of the Ordinary, to take an Obligation or Recognizance to obey the Proceſs of Eccleſiaſtical Courts.

Stat. idem, *Sect.* 2. This not to extend to Suits for Tithes, *&c.* in *London.*

——— *Sect.* 3. And the Parties ſued may have an Appeal, Prohibition, or other legal Defence.

——— *Sect.* 4. This to continue until a Body of Eccleſiaſtical Laws be appointed by the King and Thirty-two Commiſſioners.

——— *Cap.* 21. *Sect.* 1. And Payment in *London* and Suburbs to continue until another Law publiſhed.

Stat. 31 *H.* 8. *Cap.* 13. *Sect.* 21. The King and Patentee of Abbey-Lands to hold them diſcharged of Tithes, as the Abbots did, *&c.* See the Statute explain'd, 2 *Co.* 46. 11 *Co.* 8. and 15. *Dyer* 277. 349. *Moor* 219. *Pl.* 356. *Cro. El.* 206. *Cro. Jac.* 607. *Cro. Car.* 265, 422. 1 *Leon.* 231.

Stat. 32 *H.* 8. *Cap.* 7. *An Act for the true Payment of Tithes and Offerings.*

——— *Sect.* 1. How Tithes ought to be paid, and in what Manner to be recovered; alſo what has encouraged Perſons to detain their Tithes from Laymen, *viz.* that Suits for Tithes, *&c.* by Laymen, were not favoured in Eccleſiaſtical Courts.

Note.

——— *Sect.* 2. That every Perſon ſhall ſet out and pay his Tithes according to the Cuſtom of the Pariſh where they are due: And Perſons Lay or Eccleſiaſtical may ſue before

before the Ordinary for ſubſtracting them. See *Cro. Eliz.* 607.

Stat. 32 *H.* 8. *Cap.* 7. *Sect.* 3. On Appeal from the Ordinary, the Appellant to pay Coſts, and Excommengement till paid. And ſo in all Suits for Detention of Tithes. See *Cro. Eliz.* 173.

——— *Sect.* 4. On Refuſal to pay Tithes, after Sentence, two Juſtices (*Quorum unus*) ſhall on the Ordinary's Certificate, commit the Offender until a Recognizance be given to perform the Sentence. (See *Stat.* 27 *H.* 8. *Cap.* 20.)

——— *Sect.* 5. But none ſhall be compelled to pay Tithes, which by the (Temporal) Laws and Statutes of this Realm are diſcharged. See 2 *Co.* 44.

——— *Sect.* 6. Nor this Act not to bind *London* or the Suburbs, or oblige them to pay Tithes otherwiſe than they ought before.

——— *Sect.* 7. That Recoveries may be had, and Conveyances made of Tithes, Oblations, and other Eccleſiaſtical Profits in the Temporal Courts; as of Lands, *&c.* by Writs of *Præcipe quod reddat*, Aſſiſe of Novel Diſſeiſin, Mortdanceſtor, *Quod ei Deforceat*, Writs of Dower, *&c.* And Judgments given, and Fines levied in the King's Courts of Tithes, or other Eccleſiaſtical Profits, ſhall be of like Force, as of Lands, Tenements, *&c.* See *Co.* 1 *Inſt.* 159. *Dyer* 83. 12 *H.* 4. 20. 11 *Co.* 25.

Stat. 32 *H.* 8. *Cap.* 7. *Sect.* 8. But Remedy for Spiritual Tithes to be had only in the Spiritual Court. See the *Stat.* 2 *E.* 6. *inſ.* and 2 *Co. fo.* 43.

Stat.

Stat. 37 *H.* 8. *Cap.* 12. That an Order of the Archbiſhop of *Canterbury*, for paying Tithes in *London*, enrolled in Chancery, to have the Force of an Act of Parliament. See this Act in the Chapter of Tithes paid in *London*.

Stat. 2 & 3 *E.* 6. *Cap.* 13. Confirms the Statutes of 27 *H.* 8. *Cap.* 20. and 32 *H.* 8. *Cap.* 7. and Provides,

Sect. 1. That Predial Tithes be paid as they ariſe, as within Forty Years they have been paid, or of Right due; and none to be taken away 'till divided or agreed for, on Forfeiture of treble the Value.

——— *Sect.* 2. The Parſon, *&c.* may ſee them ſet out, and ſevered from the Nine Parts, and he that willingly withdraws before, or hinders the Parſon, *&c.* on Proof thereof before the Judge (Spiritual) to pay double the Value beſides Coſts, *&c.*

——— *Sect.* 3. The Owner of Cattle going in a Pariſh or Place uncertain, to pay where he dwells.

——— *Sect.* 4. A ſaving of all Privileges and Preſcriptions to be diſcharged.

——— *Sect.* 5. Barren, Waſte, or Heath Lands not diſcharged by Parliament, *&c.* ſeven Years after Improvement to Arable or Meadow, ſhall pay.

——— *Sect.* 6. If Barren Land uſed to pay, the Improver during the ſeven Years to pay only what was uſed.

——— *Sect.* 7. Merchants, Handicrafts, and Faculties (that for forty Years have paid perſonal Tithes) to pay the Tenth of their

their clear Gains, Charge, &c. deducted: Day-Labourers excepted.

Stat. 2 and 3 *E.* 6. *Cap.* 13. *Sect.* 8. The Cuſtom of Payment of Tithes by Handicrafts, to be uſed as in forty Years paſt.

——— *Sect.* 9. On Refuſal to pay perſonal Tithes, the Ordinary to examine the Party, but not on a Corporal Oath.

——— *Sect.* 10. Offerings, &c. to be paid where the Party dwells at the four Days accuſtomed, or at *Eaſter*.

——— *Sect.* 11. This Act not to extend to Sea-Coaſt Towns, but they to pay Tithe-Fiſh, as uſual.

——— *Sect.* 12. The Inhabitants of *London*, *Canterbury*, &c. that uſed to pay Tithes by Houſes, are to do ſo ſtill.

——— *Sect.* 13. On ſubſtracting Tithes, Offerings, &c. Parſons, &c. to ſue in the Eccleſiaſtical Court only, and the Party offending to be excommunicated, and after forty Days Proceſs (of *Excom. Cap.*) may iſſue.

——— *Sect.* 14. Prohibitions to be iſſued as uſual; but the Suggeſtion to be proved in ſix Months, or a Conſultation to be awarded, and Double Coſts.

——— *Sect.* 15. This Act not to give Juriſdiction to the Eccleſiaſtical Courts, *contra Weſtminſter 2. c. 5.* Nor *Articuli cleri*, *Sylva cædua*, the Treatiſe *De Regia Poteſtate*; or 1 *E.* 3. *Cap.* 10. or 11. Or where the King's Courts have Juriſdiction.

——— *Sect.* 16. No Tithe of Marriage-Goods to be exacted in *Wales*, or the Marches. See *Chap.* 4.

Stat.

Stat. 2 & 3 *Ed.* 6. *Cap.* 20. *Sect.* 3. A Parſon, *&c.* ſhall only be deprived of one Benefice on Certificate of Non-payment of his Tenth to the King.

——— *Sect.* 4. And no Incumbent is thereby diſabled from taking a new Benefice, *&c.*

See alſo the Statutes 7 *E.* 6. *Cap.* 4. *Sect.* 2. 2 & 3 *P.* & *M. Cap.* 4. 1 *Eliz. Cap.* 4. *Sect.* 22. to *Sect.* 40. Touching Tenths to the King, *&c.*

Stat. 13 *El. Cap.* 10. Againſt fraudulent Deeds and Aſſurances made by Spiritual Perſons, of their Lands, Tithes, *&c.* to defeat their Succeſſors of Remedy for Dilapidations, *&c.*

Stat. 18 *El. Cap.* 11. For explaining the Statutes againſt Dilapidations, *&c.*

——— *Sect.* 7. That Tithes may be detained by an Inhabitant, after Sentence given on a Leaſe void by Non-reſidence.

Stat. 22 & 23 *Car.* 2. *Cap.* 15. For ſettling Tithes in *London*, in the Pariſhes burnt and rebuilt there.

Stat. 3 *W.* & *M. Cap.* 3. For the better aſcertaining the Tithes of Hemp and Flax. See the Act; and that of 11 & 12 *W.* 3. *Cap.* 16. And their Continuances, *&c. Poſt.* towards the End of *Chap.* 2.

Stat. 7 & 8. *W.* 3. *Cap.* 6. For the more eaſy and effectual Recovery of ſmall Tithes, *&c.* made perpetual by *Stat.* 3 *Ann. c.* 18. *Stat.* 7 & 8 *W.* 3. *c.* 34. for obliging Quakers to pay Tithes, *&c.*

Stat. 1 *Geo.* 1. *Cap.* 6. For explaining and enforcing the ſaid Act, in Relation to the Payment of Tithes and Church-Rates.

CHAP.

CHAP. II.

Of Predial Tithes, their Nature, Kinds, and Incidents in particular; for what Things due of common Right, &c. and in what Caſes not due by Cuſtom or Preſcription, and the Reaſons thereof; and this with Reſpect to the Tithes of Corn, Grain, Hay, Graſs, Wood, Trees, Fruits, Herbs, Seed, Honey, Wax, &c. And the ſeveral Statutes for aſcertaining the Tithes of Hemp and Flax, &c. and quære *if great or ſmall Tithes.*

Predial Tithes.

HAving in the foregoing Chapter treated of Tithes in general, and therein given a Definition or Deſcription of their ſeveral Kinds, *viz.* Predial, Perſonal, and Mix'd, and for what Things they are uſually paid or not paid, reſpectively; we ſhall now proceed to diſcourſe of each of theſe more particularly, and in this ſecond Chapter ſhew the Nature, Kinds, and Incidents of Predial Tithes; for what Things, and in what

what Caſes they are due or payable, and in what Caſes they are not payable, and the Reaſons thereof.

Their Nature. And firſt, as before is obſerved, Predial Tithes are ſuch as ariſe merely from the yearly Fruit or Produce of the Earth, Land, or Ground only. For a Piece of Land or Ground being called in *Latin*, *Prædium*, whether it be Arable, Meadow, or Paſture, the Fruit or Produce thereof is called Predial, and conſequently the Tithe payable for ſuch *annual* Produce, is called a Predial Tithe.

Kinds. Theſe Predial Tithes are divided into two Kinds, *viz.* 1. *Majores Decimæ*, or Great Tithes, which are commonly call'd *Parſonage Tithes*, for that they are properly due and moſt uſually paid to the Parſon, (who is ſometimes the Lay Patron) or Rector of the Church. 2. *Minores vel minutæ Decimæ*, or ſmall Tithes; and theſe are uſually called Vicarage Tithes, as being properly due and payable to the Vicar or Curate, though ſometimes (as in a Vicarage endowed) he has Part of the great Tithes alſo.

Predial great Tithes and ſmall Tithes. The Predial great Tithes are chiefly of Corn or Grain ſown in Fields open or incloſed, as Wheat, Barley, Rye, Oats, &c. And ſo, I conceive, are Beans, Peaſe, Tares, Fetches, and the like, when ſown in ſuch Fields (*contra*, if ſown or ſet only in Gardens, or in ſmall Quantities; for then they are properly *minutæ Decimæ*, or ſmall Tithes.)

Corn.

Graſs, Hay, Wood. Alſo the Tithe of Graſs and Hay is a great Tithe (and ſo to me ſeems the Agiſtment or Feeding of Cattle) as ariſing annually

nually *ex prædio*, and ſo is eſteemed the Tithe of Underwood, and likewiſe the Toppings and Loppings of Trees, if *Sylva Cædua*, *i. e.* under twenty Years Growth. And the like of Maſts and Acorns; if a great Part of the Pariſh be of Woods and Trees, bearing ſuch Maſt or Acorns (*contra* if growing only in Hedges or *Sparſim* in ſmall Numbers.) See 2 *Rol. Abr.* 335. *Sect.* 5 & 8. *Acorns.*

And the like may be ſaid of Apples or Pears, and ſome other Fruits. For if great Part of the Lands in the Pariſh be planted with Trees bearing ſuch Fruits, whereof Cyder, Perry, or other Liquors are made, as in *Herefordſhire*, &c. or the Fruit ſold, as Pippins in *Kent*, &c. The large Quantities of ſuch Fruit will, as I apprehend, bring it within the Denomination and Nature of *majores Decimæ*, or great Tithes. And the like of Flax, Hemp, &c. according to the Opinion of *Holt*, Ch. Juſt. which to me ſeems the better, though *Dolben* and *Eyre contra*, in the Caſe of *Wharton* and *Liſle. Paſch. & Trin.* 5 *W. & M.* See *Cumb.* 201, 209. *Apples, Pears.*

And the like Reaſon holds in the Caſe of Roots, Seeds, Herbs, &c. as Turneps in many Pariſhes of *Norfolk*, &c. Potatoes, Parſnips, &c. in *Middleſex*, *Kent*, *Surry*, &c. or the like; Saffron and Woad in *Eſſex*, &c. And of Hops, Hemp, Flax, Honey, Wax, &c. in divers Counties. Where they are generally ſown, planted, or made, they muſt in Reaſon be denominated great Tithes; whereas if they are only produced in ſmall Quantities, they cannot be eſteemed *Potatoes, Turneps, Parſnips, Saffron, Woad, Hops, Hemp, Flax, Honey, &c.*

other

other than minute or ſmall Tithes. See and note the Caſe of Clover and its Seed, *Skinner* 341.

Now for the better illuſtrating of the before-mentioned Particulars; let us examine what our Law Books have ſaid of each of them reſpectively; and firſt,

Tithe of Corn due of Common Right.

The Tithe of Corn and other Grain is ſaid to be due of Common Right, *i. e.* by Force of the Common Law, and ought accordingly to be duly ſet forth and paid. See 1 *Roll. Abr.* 644. *Noy* 1 *Roll. Rep.* 172. 1 *Sid.* 283. But Cuſtom ſometimes admits the contrary. *Vide infra.*

And to be ſet forth, &c.

Alſo of Common Right, *i. e.* where the Cuſtom is not otherwiſe, the Owner of the Corn ought to cut down and prepare the ſame, *i. e.* divide it from the Nine Parts, bind it into Sheaves, put it into Shocks, Cocks, or Heaps, *&c.* See 1 *Roll. Abr. &c. ſupra.*

Suit for not doing it, and how.

And if the Owner refuſe to do it, the Parſon may ſue him for it in the Spiritual Court; but then the Suit ought to be *Special* for not ſetting them forth into Cocks; or as the Claim is, and not *generally*, for not ſetting them forth. See *Latch* 125. *Layton's* Caſe.

But having made the Corn into Sheafs, he is not bound to ſet it up in *Shocks*, or caſt it into (larger) *Heaps*, unleſs the Cuſtom of the Place oblige him thereunto; but having either bound it into Sheafs, or made it into Cocks, he may ſet forth the Tithes thereof accordingly; and thereby they become *Lay Chattles* (See *Smith's* Caſe in *Goldſboro.*)

boro.): After which he may heap his own Sheafs, or do with them as he pleaſeth. And the Tithes being ſo ſet forth, the Owner of the Corn is not bound to watch or look after them 'till the Parſon carries them away. See *Noy* 31. 1 *Roll. Abr.* 644. For it ſeems the Parſon is at his Peril to take Notice of the Tithes, being ſo ſet out; and if he does not come to take them away in due Time, an Action will lie againſt him as againſt a Treſpaſſer, by the Owner of the Ground. *Vide Godol. c.* 32. §. 23.

The Parſon to take them.

But the Manner or Form of ſetting out or Payment of Tithes, is for the moſt Part governed by the Cuſtom of the Place; and therefore if by Cuſtom the Tenth Part of the Corn, Graſs, *&c.* hath been meaſured forth as it ſtands or is growing on the Land, (as it is in ſome Parts of *Lincolnſhire*, &c.) this Cuſtom is good, and the Parſon muſt be contented to cut the Corn, or mow the Graſs of his Tithe Part. See *Degg*'s Parſon, *Lib.* 2. *Cap.* 2. *Watſon* 540.

Cuſtom to guide the Practice.

Corn, &c. not ſet forth.

So if the Cuſtom of the Place be that the Parſon is to have for his Tithe of Corn, the Tenth Land or Ridge of Corn, beginning at ſuch Land or Ridge as is next to the Church, this Cuſtom is good. And if in ſuch Caſe the Pariſhioner, to defraud the Parſon, does not manure ſuch Tenth Land or Ridge as ſufficiently as the reſt, the Parſon may have an Action at Common Law for the Fraud and Covin. See *Moor* 913. *Stebbs* and *Goodlocks.*

Tenth Ridge by Cuſtom.

But in that Caſe it is ſaid, that *Wray*, Ch. Juſt. was of a different Opinion, and held

To be reap'd, &c. by the Parſon.

that ſuch a Cuſtom was againſt Common Reaſon; but he agreed, if the Cuſtom be good, the Parſon may well have his Action on the Caſe, for the fraudulent Manuring or Sowing of the Lands, &c. See 2 *Leon* 70.

A reaſonable Cuſtom.

And yet to me it ſeems ſuch a Cuſtom or Preſcription may have a reaſonable Foundation on this Suppoſal, that the Field where thoſe Lands or Ridges lay, was originally a common waſte Field belonging to the Townſhip, and that, on an Agreement of the Pariſhioners to turn it into Arable, they conſented to allot the Tenth Land or Ridge by them ſown, to the Parſon; but he to reap it, &c.

Preſcriptions againſt paying Tithes.

Alſo a Cuſtom or Preſcription may be within a Pariſh, that by Reaſon they have not ſuffiient Meadow for Milch Kine and Draught Cattle, they have uſed to cut ſome of their Tares green, and give them to the ſaid Cattle, and to be diſcharged of ſetting out or paying Tithes of the ſaid Tares. This is a good Cuſtom and Conſideration; for that the Parſon hath an Advantage thereby as well as the Pariſhioner, *viz.* in the Tithe Milk, and manuring of the other Corn Lands. 2 *Leon.* 27. *Perry* v. *Somes.*

Tares uſed for feeding Milch Cattle.

And in that Caſe *Wray*, Ch. Juſt. ſaid, the Matter or Cauſe is the Want of Meadow and Paſture; and that the Surmiſe is as if it had been ſaid, that for want of Meadow and Paſture, they had uſed to eat their *Meadows* (*Quære* if not *Arable* Lands) with their Plough Cattle, and for ſo much as they did eat, to pay no Tithes, which he allowed to be good. *Ibid.* S. C. 3 *Cro.* 139.

So

So if a Man according to the Cuſtom of the Country doth ſow his Land (with Oats, Barley, *&c.*) to feed his Horſes for Tillage, and the Uſe hath been to ſuffer ſuch Horſes to feed on the Land, without mowing of the Grain: And ſo as I apprehend (where it is to feed them off from the Land after ſuch Grain is mowed or reaped) in this Caſe, the Parſon ſhall not have any Tithes thereof, becauſe it is no more than Paſture for his Horſes. *Soames*'s Caſe cited, 1 *Roll. Abr.* 646. *Grain ſown to feed Horſes for Tillage.*

But ſome are of Opinion, that without ſuch Cuſtom as aforeſaid, green Tares cut to feed labouring Cattle, ſhall pay Tithes; and that ſo ſhall Corn ſown on Head-Lands and employed to the ſame Uſe: For that, when one libelled for the Tithes of green Tares cut, and Corn ſown on Head-Lands, fed with labouring Horſes, a Prohibition was granted, not upon the general Suggeſtion, but upon the Cuſtom of the Pariſh ſpecially alledged, that no Tithes were due by Cuſtom there in thoſe Caſes. See *Watſon* 539. But this ſeems only his Opinion. *Quære of green Tares cut to feed Cattle.* *Suggeſtion.*

And Note in theſe very Caſes it is ſaid that in a Prohibition it is not needful to preſcribe to be diſcharged of Tithes for the feeding of ſuch Horſes: For that they are diſcharged by the Common Law. See 1 *Jon.* 337. 1 *Cro.* 139, 393, and 1 *Roll. Abr.* 650. *Mead* and *Thirland*; which ſhews they are diſcharged without ſuch Cuſtom; and conſequently that the Cuſtom need not be alledged to ſupport a Prohibition in thoſe Caſes. See *Litt.* 13. *Lane* 16. *Prohibition.*

And of this Opinion was *Mountague* and *Dodridge* in the Caſe of *Kneebon* and *Wood-*

Modus.

reſt. Hill. 15 Jac. 1. B. R. and though *Houghton* thought the contrary, for that their Labour in ſuch Caſes was in manner of a *Modus* for their Tithes; yet *Clinch* and *Clark* ſaid, that of later Times they have not uſed to preſcribe or alledge ſuch a Cuſtom; but that otherwiſe it was anciently, (*i. e.* when the Canon Law exerted its Power.) See 1 *Roll. Abr.* 646, 647.

Green Peaſe eaten.

In like Manner, if a Man gather green Peaſe or Beans to eat in his Houſe, no Tithes ſhall be paid of them, and that by the Law of the Land; but otherwiſe it is, if he gather them to ſell, or to feed his Hogs, &c. *per Cur.* 1 *Roll. Abr.* 647. And in Evidence to a Jury it was ſaid by *Windham*, that of Hay mown to feed Deer, no Tithes are paid: But by *Glyn* and *Finch*, they are due of common Right, and ſhall be paid, unleſs there be a Cuſtom to the contrary. See 2 *Keeble* 22.

Hay to feed Deer.

Not of the Corn and Sheep, &c. fed too.

Alſo the Parſon ſhall not have Tithe both of Corn, and of Sheep taken in *pro meliore ratione agriculturæ infra Terras arabiles*, as amongſt other Points was reſolved in an anonymous Caſe, *Trin* 28 *Car.* 2. *C. B.* which is thus reported in 1 *Mod.* 216.

A Vicar libelled in the Spiritual Court for the Tithe of young Cattle, and ſurmiſed that the Defendant was ſeiz'd of Lands in *M.* of which Pariſh he was Vicar, and that the Defendant had Common in a great Waſte, called *Sedgemore*, as belonging to his ſaid Lands in *M.* and put his Cattle into the ſaid Common, and the Defendant prayed a Prohibition, for that the Lands where

the Cattle went were not within the Pariſh of *M.*

Willow-Faggots.

The ſame Plaintiff libelled againſt the ſame Defendant for Tithes of Willow-Faggots, and the Defendant, for a Prohibition ſuggeſted the Payment of 2 *d.* a Year to the Rector for the Tithes of Willow.

The ſame Plaintiff alſo libelled for the Tithes of Sheep, and the Defendant to have a Prohibition thereto, ſuggeſted that he took them in to feed after the Corn was reaped, *pro melioratione agriculturæ infra Terras arabiles, & non aliter.*

Stat. 2 *E.* 6. *Cattle fed extraparochical.*

As to the firſt of thoſe Libels, no Prohibition was granted, becauſe of that Clauſe in 2 *E.* 6. which enacts, *That Tithes of Cattle feeding in a Waſte or Common, where the Pariſh is not certainly known, ſhall be paid to the Parſon,* &c. *where the Owner of the Cattle lives.*

Modus *to the Rector a Diſcharge againſt the Vicar.*

As to the ſecond, the Court held that a *Modus* to the Rector is a good Diſcharge againſt the Vicar (for the ſaid Tithe of Willow.) *Vide poſt* 224.

Not due for Corn and Sheep too.

And for the third, they held that the Parſon ought not to have Tithe of Corn, and for the feeding of Sheep on the Land too. For by ſuch feeding the Ground is made more profitable, and produces more (Corn, &c.) See 1 *Mod.* 216.

The Tenth due of common Right.

When the Tithes of any Sort of Corn or Grain are ſet forth, the Tenth thereof of common Right is to be appointed for the Parſon; and therefore if a Preſcription be to pay certain Sheafs of Corn for all Tithes of Corn, this is no good Preſcription; for the Pariſhioner ought to make it into Sheafs;

and therefore one Part of his Duty in Kind cannot be in Satisfaction of the Reſidue. 1 *Roll. R.* 173.

But may be leſs by Cuſtom. But where Tithes are not due of common Right, but by particular Cuſtom, there a Cuſtom, to pay a leſs Share than a Tenth, without other Conſideration (as for Tithe-Fiſh, *&c.*) may be good: Yet this ſeems to be left as a *Quære.* 1 *Sid.* 278. 1 *Lev.* 179. and 2 *Keb.* 2. But ſee 2 *Salk.* 655. 4 *Mod.* 336. *Cumb.* 403. and *Skinner* 560. That ſuch a Cuſtom is good.

Part of one Thing paid for the whole of all. Alſo, where one did preſcribe to pay in one Part of his Land, the third Part of the Tenth of Corn, and in another Part the Moiety of the Tenth thereof, for all Manner of Tithes, the Court inclin'd that this was a good Preſcription. See *Root*'s Caſe *Goldsb.* 7.

No Tithe of Surplus Sheafs. And if the Cuſtom be, that the odd Sheafs or Shocks under the Number of Ten ſhall not be tithed, by Reaſon that they ſet the Tithes up in Heaps or Shocks, which of common Right the Owner of the Corn is not bound to do (the Owner being only bound to divide the ſaid Sheafs or Shocks, and to ſet forth the Tenth thereof) ſuch a Cuſtom upon ſuch Conſideration is good. *Latch* 226.

Nor of Rakings. Quære *infra.* The Tenth Sheaf or Shock being ſet forth for Tithe, as aforeſaid; if the Owner of the Corn ſhall, after the Sheafs or Shocks are carried away, rake over the Land on which the Corn grew, by the Cuſtom of this Realm no Tithes are due, or ſhall be paid, for ſuch Rakings; as is cited to have been adjudged,

adjudged, *Moor* 278. and 1 *Anderſon* 199. *Berd* and *Adams*'s Caſe.

Adjudg'd contra.

And yet in that very Caſe of *Berd* and *Adams* the contrary was adjudged, *viz.* that Tithes ſhall be paid of Rakings, becauſe the Tenth Sheaf or Shock of Corn is a Satisfaction for no more than the Grain of which it is the Tithe, and can be no Satisfaction for the Rakings; and this ſeems alſo to be ſo agreed and adjudged in 3 *Cro.* 363. *Jeſſop* and *Paines*'s Caſe.

And Preſcription for it void, &c.

So it is ſaid to have been adjudged in Sir *Charles Morriſon*'s Caſe, that if one preſcribed to pay the Tenth Part of Corn in the Sheaf for the Tithes of all that is in the Sheafs, and of all which is raked, it is a void Preſcription, becauſe the Owners of the Corn are to pay the Tithes of both; alſo the Preſcription is unreaſonable, for then the Owner might put the leſſer Part into Sheafs, and leave the greater Part to be raked. See *Griſman*'s Caſe. 3 *Cro.* 446.

Difference reconciled.

But to reconcile this Difference we muſt obſerve, that if the Cuſtom be laid to put the Corn into Sheafs or Cocks, and to pay the Tenth Sheaf or Cock in Satisfaction of the Tithes of the Corn, and of the Rakings *minus voluntarie* diſperſed, this is good. 3 *Cro.* 702. *Noy.* 15. And the Books generally ſay, that if the Corn reaped be not covinouſly ſcattered, or left unbound with Intent to deceive the Parſon, then no Tithes are to be paid of the Rakings; but if fraudulently ſcattered or left, and ſo raked, then the Tithe of all the Rakings is to be paid. See 1 *Roll. Abr.* 645. *Moor* 910. 1 *Roll. Rep.*

Minus voluntarie.

Foul Rakings

379. 3 *Cro.* 475, 690, & 702. 3 *Bulſt.* 243. 3 *Keeb.* 251, 284.

To be ſhewn by the Parſon. And note; If a Prohibition be granted upon a Suggeſtion that a Perſon is ſued for Rakings in the Spiritual Court, without any Averment that the Rakings were *minus voluntarie* diſperſed, it is good; for that it ought to be ſhewed on the Part of the Defendant, in Order to have a Conſultation, that the Rakings were foul Rakings, and of conſiderable Value, 1 *Roll. Rep.* 379. *Pitt* and *Harris*, and 3 *Cro.* 702. *Green* and *Hun.*

Suggeſtions not good. Yet in the Caſe of *Pitt* and *Harris*, as it is abridg'd in 1 *Roll. Abr.* 645. it is ſaid to be adjudged, that upon a Prohibition the Suggeſtion ought to be, that the Rakings were *minus voluntarie ſparſæ*, otherwiſe it is not good; and that it is not ſufficient to ſay, they were *lapſæ & diſſipatæ in Collectione.* See 3 *Keeb.* 251, 284. (*Peters* and *Prideaux*) before recited.

Neither is it a good Suggeſtion, that in Conſideration that the Pariſhioner having Barley, the greater Part of which he cut down and bound into Sheafs, and put into Cocks, whereof the Parſon hath the Tenth Cock; that he uſed to leave a ſmall Parcel of the Barley ſtanding to the Intent to cut it down afterwards to make Bands for the Rakings involuntarily ſcattered, and to be diſcharged of the Tithes of this ſmall Parcel of Barley when cut down. *Per Cur.* 1 *Roll. Abr.* 650. *Saunders* and *Paramour.*

When to be proved. And note, a Suggeſtion in Caſe of Tithes muſt be proved within ſix Kalendar Months of

of the *Teſte* of the Prohibition. 2 *Salk.* 554. See the Stat. 2 & 3 *E.* 6. *poſt*, 384, 389.

No Tithes of Stubble,

As no Tithes are to be paid of the Rakings of Corn duly Tithed, ſo neither of the Stubble left on the Ground in the reaping thereof, though the ſame be cut for Thatch or other Uſes; and *Tanfield* ſaid it was ſo adjudged in one *Edolph*'s Caſe. See *Telverton* 86. 1 *Roll. Abr.* 640. *F. N. B.* 53. *B.*

or After Crop, or Graſs.

Neither is the Owner of the Corn, having ſet forth and paid the Tithes thereof, to pay any Tithe of the After-Crop, or *Grotten*, or Graſs of the ſame Lands. See 2 *Brownl.* 30. 2 *Inſt.* 552. Nor for any Agiſtment or Feedings in ſuch Lands. See 1 *Rol. Abr.* 642.

Quære of Self-ſown Corn.

Yet I conceive, if Corn do ſhed in the Fields, being beaten out by the Winds, or loſt upon the Ground, for that it was not ſeaſonably cut, and this Corn do grow and become a Crop in the following Year, (which ſometimes happens, and is called *Self-ſown Corn*,) that Tithes ſhall be paid thereof, as Tithes of the Land for the following Year. For this is an yearly *Increaſe*.

Nor of Fallow Lands.

If Tithes have been paid of Corn growing in one Year, and in the next Year the ſame Land is not ſeeded, but lies fallow, to the End of making it more fruitful in the third Year, and then it is manured and ſown, no Tithe is to be paid for ſuch Land in the ſecond Year. *Per Cur.* 1 *Roll. Abr.* 642. *Smith*'s Caſe. For here is no *Increaſe*.

And it is a good *Modus Decimandi*, that in Conſideration they who ſow the Lands are to reap, bind, and ſever the Tenth from the Nine Parts, and ſet it up into Heaps, that

that the Parſon ſhall not have any Tithes of this Land in the Year next enſuing, the Land lying ley, and not tilled or converted into Paſture; for of common Right, the Pariſhioner is not bound to gather and ſet up the Tithes in Heaps, *&c.* (as before is ſhewn.) *Per Cur.* 1 *Roll. Abr.* 649.

Tithe of Hay and Graſs.

The next Kind of Predial Tithe is that of Hay and Graſs; for the Tithe of Hay of all Lands Tithable in each Pariſh, and of Graſs cut for Hay in Orchards, *&c.* is a Predial Tithe, and to be yielded to every Patron, Parſon or Vicar who hath a Right thereto. 2 *Inſt.* 652.

Guided by Preſcription and Cuſtoms.

But the Manner of Payment of this Tithe (as well as of that of Corn and Grain) is alſo guided by Preſcription, and the Cuſtoms uſed within particular Pariſhes.

Headlands.

As if in a Pariſh there be a Cuſtom, that the Owners of the Headlands have uſed, Time out of Mind, to make the Tithe of Hay of the Pariſh for the Parſon, and in Conſideration thereof to be diſcharged of the Tithes growing on the ſaid Headlands; (a Headland being a ſmall Piece of Land on which a Team turns in ploughing) this is a good Conſideration to make the Preſcription good. *Hetley* 147. and *Lane* 16.

But a Preſcription to pay the Tenth Part of Corn, for the Hay (and Corn alſo) that grows upon the Headlands is not good, becauſe the Tenth Part paid is due for the Corn only. *Noy* 15. *ante* 36, 37.

Yet if the Preſcription be, that the Pariſhioner hath uſed to Cut, or Reap, Bind, or Shock the Parſon's Corn; and in Conſideration

deration thereof to be discharged from the Tithe of the Hay of his Headlands; this is said to be good and a reasonable Consideration, because the Parishioner by the Common Law is not bound to Reap, *&c.* the Parsons's Part. And by the Civil Law the Parson is to have the Tenth Ridge of Corn.

But the Reason of this Case is disallowed by Mr. *Watson*, as being contrary to that of the other Cases before cited. And yet, he admits that the setting the Parson's Corn into Heaps, may be a reasonable Consideration of the Prescription, because they are not bound to do this of common Right. 2 *Leon.* 70. Watson, p. 552.

And it seems, a Prescription not to pay the Tithe of Hay growing upon Headlands, on which the Horses and Plough turn, is good, without laying any Thing in Consideration thereof: But then it must be averr'd, that the Headlands are but sufficient to turn the Plough upon. 1 *Roll. Abr.* 646. *Bird* and *White. Cro. Car.* 293.

Also if a Farmer do cut down his Grass, and only puts it in Swaths, and then carries it away and gives it green to his own Cattle for their necessary Sustenance, not having Grass sufficient to maintain them otherwise, no Tithes shall be paid thereof. *Green Grass cut for Cattle.*

And if Land be so strong as to afford two Crops of Hay in one Year, and the Occupier of the Land can prescribe, that in Consideration the Owner doth make the first Tonsure into good and sufficient Hay, and set it forth in Cocks sufficiently dried; then he shall be discharged of the Tithes *After-mowth discharged, &c.*

of

of the After-mowth, this is a good Preſcription and Diſcharge, by Reaſon of the Labour and Coſts he beſtowed in making the firſt Tonſure into Hay. See 1 *Roll. Abr.* 648. 1 *Cro.* 404. 3 *Cro.* 660. and *Moor* 910. and 2 *Cro.* 42, and 116.

By Preſcription. Or if the Preſcription be to be diſcharged of the Tithe of the After-mowth, only upon Conſideration that they have uſed Time out of Mind to cut down the Graſs of the Firſt-mowth to feed, and gather the ſaid Graſs ſo diſperſed into Weaks, and Windrows, and put it into ſmall Cocks at their own Coſts, this is ſufficient, though it be not made into perfect Hay. 2 *Cro.* 42. *Hall* and *Fettyplace.*

Yet ſome hold, that Tithes *de Jure* are to be paid of the After-mowth, except there be ſome ſuch like Preſcription for their Diſcharge. *Quære de hoc*, and *vide* 1 *Roll. Abr.* 640. the Parſon of *Stanfield*'s Caſe, *Per Cur.* ſo adjudged.

Conſiderations. But without Queſtion, the preparing of the Tithe Graſs when mowed into Hay, is a good Conſideration upon which to ground a Diſcharge of the Tenth of all After-Profit that may be made the ſame Year of the ſame Land; ſo that if the After-Graſs be eaten with Cattle, no Tithe ſhall be paid for them. See *Yelv.* 86. *Hetl.* 98. and *Mic.* 42, 43 *Eliz. Johnſon*, and *Popinger*, and 1 *Jac.* 1. *Eeles*, and *Vachin*, and 3 *Jac.* 1. *Eeles*, and *Saunders*, and *Hill.* 8 *Jac. Eeles*, and *Winterbolt.*

For Prohibitions. In all which Caſes Prohibitions were granted in *B. R.* And *Mich.* 14 *Jac.* 1. *Johnſon* moved

moved for a Conſultation upon the ſaid Prohibition granted in 43 *Eliz.* againſt *Popinger*, but it was denied. And *Paſ.* 11. *Car.* 1. *Langford*'s Caſe in *B. R.* a Prohibition was granted, upon ſuch a Surmiſe, for an After-mowth. And *Paſ.* 14 *Car.* 1. *B. R.* between *Manning* and *Clapham*, a Prohibition was granted to a Suit, for fatting of Sheep upon the After-Paſture; and ſo *Paſ.* 16 *Jac.* 1. between *Nicholls* and *Hopper*. *Vide* 1 *Roll. Abr.* 648, and 649.

No Tithes due of After-mowth of common Right.

But in that Caſe *Popham* ſaid, that he had known it to be reſolved, that of common Right, without any ſpecial Cuſtom alledged, no Tithe ſhall be paid of the Hay of an After-mowth; for that the Rule of Law is, that Tithes ſhall be paid *Ex annuatis renovantibus ſimul & ſemel* only, and ſo by Conſequence not of the After-Graſs depaſtured. 2 *Cro.* 42. *Hob.* 250.

Alſo it hath been reſolved, that no Tithe is to be paid of After-Graſs, *de Jure*, and that a Cuſtom ought to be alledged to ſupport it. See 1 *Roll. Abr.* 640.

Graſs fraudulently left.

(But this is ſaid to be underſtood only where no more Graſs is left by the Scythe than is uſual; for if more Graſs than uſual is fraudulently left, the Caſe is otherwiſe. 2 *Bulſtr.* 238.)

Inn-Keepers Herbage.

Therefore it is ſaid, if an Inn-Keeper doth pay Tithe-Hay of certain Land, and the Reſidue of the Year after doth put into the ſame Land the Horſes of his Gueſts, which come to Market in the ſame Town, no Tithes ſhall be paid for the Herbage of thoſe Horſes, for this is but the After-Paſture

ſture of the Land whereof he had before paid the Tithes; *per Cur.* Nor ſhall Tithes be paid for Agiſtments in ſuch After-Paſture. 1 *Roll. Abr.* 641. 2 *H.* 4. *Rot. Parl.* 93.

Agiſtments.

The Manner of Tithe of Hay guided by Cuſtom.

Although as has been ſaid, Tithe-Hay of common Right is to be paid in Kind, yet by Cuſtom or Preſcription ſome other Conſideration may be due and payable in Lieu thereof; but then what is paid, how little ſoever the ſame be, muſt be to the Benefit of him to whom the Tithe-Hay of common Right was payable. For Example:

Cuſtoms to be ſupported by good Conſiderations.

When one ſurmiſed that Time out of Mind, the Owners of certain Lands had found Straw for the Body of the Church, in Diſcharge of all Tithes of Hay, it was held by the Opinion of the whole Court, that this no is Cauſe of Diſcharge; for that the Parſon was not chargeable with the finding of the Straw, nor had any Benefit by the Other's finding it. But otherwiſe it had been, if it had been alledged that the Straw was given to the Parſon, and that he beſtowed it on the Body of the Church.

It is alſo ſaid to have been ruled, *Hill.* 30 *Eliz.* That where one preſcribed that he had uſed to pay the Pariſh-Clerk his Wages, in Satisfaction of Tithe-Hay; this was no good Diſcharge. *Paſ.* 34 *Eliz.* 3 *Cro.* 276.

Modus for Tithe-Hay revived in Arable.

If there is a *Modus* ſufficient to diſcharge Lands of the Tithe of Hay, and the ſame Lands are ſown divers Years with Corn, this doth not deſtroy the *Modus*, but the ſame ſhall continue (or revive) when the Lands are again turned into Meadow, or Paſture;

Paſture; and whilſt they are ſown with Corn, the Parſon ſhall have Tithe in Kind thereof. *Trin.* 10 *Jac.* 1. *Brown's* Caſe in *Godbolt.*

When the Tithe of Hay is to be paid in Kind, the Owner ought of common Right to cut down and make the Graſs into Hay; *per Cur.* 1 *Roll. Rep.* 172. For there the Caſe was, that one had uſed to pay a Load of Hay for all Tithes of Hay growing and renewing upon the Lands where, *&c.* and alledged, that they uſed to make the Graſs into Hay by their own Labour and a Prohibition was denied by the whole Court upon this Reaſon, that the Pariſhioner ought to make the Graſs into Hay, and ſo this is but Tithes in Kind, which cannot be a Conſideration for a *Modus Decimandi*, no more than if a Man ſhould preſcribe to pay certain Sheafs of Corn for all Tithes of Corn; for he ought of common Right to make it into Sheafs; and therefore Part of the Duty in Kind cannot be a Satisfaction for the Reſidue. 1 *Rol. R.* 172. *Per. Cur.*

When the Owner is to cut down the Graſs and make it into Hay.

Conſideration if good or not.

And yet it hath been held, that to make the Parſon's Hay is more than the Owner is bound to do of common Right; and therefore that the Uſage of making it into Hay for him, may be a good Diſcharge as to ſome other Thing. See *Hetley* 147. 2 *Cro.* 42. New Caſes in Equity 117.

And it hath alſo been held, that the Pariſhioner is not bound of common Right to ted and ſhake the Graſs abroad, and to gather it into Weaks and Wind-rows; for that the Tithe may be ſet forth in Graſs-Cocks

Conſideration of a Diſcharge.

Cocks before it be tedded; and that the doing of that only is a good Conſideration for a Diſcharge of the After-mowth. 1 *Roll. Abr.* 644. 2 *Cro.* 42. *Hob.* 250. *Hall* and *Fettyplace.* And 328. *Hall* and *Symonds.*

But, as *Moor* reports the ſame Caſe, to make Graſs into ſmall Cocks is no good Conſideration for ſuch Diſcharge, but to make it into great Cocks is a good Conſideration; and ſo it is ſaid to be held in *Johnſon's* Caſe. *Vide Moor* 758. But note; the Caſe, as it is reported by *Moor*, is miſtaken; and the Caſe, as reported by *Crook* 42. is right; for ſo it appears by the Roll.

By common Right Graſs to be in Cocks. Quære.

And from the ſeveral Reſolutions and Caſes aforeſaid, it ſeems clearly to follow, that Graſs of common Right is tithable when put into Graſs-Cocks, (*Quære* if not when in Graſs-Swaths.) and not before; for that then the Tenth may be ſevered from the Nine Parts. And ſo it has been adjudged, as it is ſaid, but this is Queried 1 *Roll. Abr.* 644. And the Caſe of *Hide* ver. *Ellis*, *Hob.* 250. ſeems *contra*. *Per Cur.* And yet in the Caſe of *Smithſon* ver. *Dodſon*, in Chancery, *Mich.* 2 *Geo.* 1. It was decreed that the Tithe of Hay is of common Right to be ſet forth and paid in Graſs-Cocks. *New Caſes in Equity*, 117.

Note

But Cuſtoms are to be obſerved.

But whatever the Owner is obliged to do of common Right, yet the Cuſtom of each Place with regard to the Manner of Tithe-ing muſt be obſerved. And therefore if the Cuſtom be to meaſure out a tenth Part of the Graſs ſtanding, for the Tithe thereof, and

and that the Parſon ſhall cut and make it, this is good. *Hob.* 250.

Parſon's Right to come on the Land, &c.

And in this and all other Caſes, when the Tithe of the Graſs is ſet forth, and the Owner is not to make it into Hay, the Parſon *de Jure* may make the Graſs into Hay upon the Land whereon it grew; and this, although the Uſage, Time whereof, *&c.* hath been to the contrary; and it is needleſs for the Parſon to alledge a Cuſtom for the doing of it; and the Parſon may paſs over the Pariſhioners Ground to that End, keeping the Path leading thereto (if there be any.) For this Right is incident to the former. 1 *Roll. Abr.* 643. *per Cur.*

Action for denying it. 1 Bulſtr. 108, &c.

And if any of theſe Things are denied him, the Parſon hath his Remedy for the ſame in the Eccleſiaſtical Court. And by *Fitz. N. B.* he may have his Action on the Caſe at common Law. See 1 *Roll. Rep.* 420. and 2 *Roll. Abr.* 284. But touching the Particulars of this and the precedent Paragraph, ſee hereafter, *Chap.* 5.

Tithe of Wood, a Predial and Great Tithe.

Thus far we have treated of the Tithes of Corn, Grain, Hay, and Graſs, with their Incidents. We come next in Order to ſpeak of the Tithe of Wood, which is alſo accounted a Predial and Great Tithe.

Coppices, Underwoods, Hedge-rows, Roots.

Firſt then, 'tis ſaid, the Tithe-Wood of Coppices, and of all Underwoods are payable *de Jure*, after they are cut; or if there be a Cuſtom for it, by meaſuring for the Parſon the tenth Acre. *Hob.* 250. and this not only when they are cut to grow again, but alſo of the Roots and Branches when grubbed up to make the Land Arable, and

ſikewiſe the Roots of Hedges, and Hedge-rows, when they ſhall be grubbed up and ſold. See 2 *Bulſtr.* 236. *Price* and *Maſcall's* Caſe. *Sed Quære, & vide infra.*

Heath, Broom. So Tithes are to be paid of Heath, Furze, Broom, *&c. i. e.* if ſold.

And if Broom be grubbed up, it is ſaid the Tithe thereof ought to be paid, altho' it be grubbed up for the End of making the Land Arable; *per Cur.* 2 *Bulſ.* 239. *Quære.*

How diſcharged. But if the Owner or Occupier of the Lands hath Time out of Mind paid Tithes of Wool, Milk, *&c.* ariſing from Cattle depaſtured thereupon, and in Reſpect thereof hath been free from the Payment of other Tithes; this may diſcharge him from paying Tithes of Wood, *&c.* See *Godb.* 44.

Alſo it is ſaid to be adjudged, that if a Man doth cut a Coppice, and thereof pays the Tithes of the Wood, and then before any new Branches are grown, doth grub up the Roots and Stubs of the Wood, he ſhall not pay Tithes of them, becauſe they are Parcel of the Freehold, and do not renew yearly, 1 *Roll. Abr.* 637. which I take to be a good Reaſon, and agreeable to the Nature of Tithes, as they are eſtabliſhed *per Legem Terræ.*

Note.

Watſon 545. *Underwood uſed for Fewel.* And yet it is ſaid, that *per Legem Terræ*, Tithes of all Underwoods are to be paid, though the Wood be ſpent for Fewel in the Houſes of Perſons uſing Lands in the Pariſh where it is cut: For that when the Tithe of ſuch Wood was demanded in the Spiritual Court, and a Prohibition was

granted on a Surmiſe that the Wood was ſpent in the Houſe for Firing, and that there was a Cuſtom in the Pariſh, That the Owners of any Houſe or Lands within the ſame Pariſh, who pay Tithes to the Parſon, ought not to pay Tithe of Wood ſpent in their Houſes, and Iſſue being joined on this Cuſtom, it was found for the Defendant, *i. e.* that there was no ſuch Cuſtom. And it was moved in Arreſt of Judgment, that although it be found againſt the Cuſtom, yet no Tithes ought to be paid of Wood ſpent in Houſe, nor for fencing Stuff for Hedges; and that ſuch (Boots for Hedge, Houſe, and Fire) are to be diſcharged of Tithes *per Legem Terræ*.

Quære & vide intra contra.

Boots diſcharged, v. poſt.

But the Court reſolved *contra*, and ſaid that it was uſual in Prohibitions to alledge Cuſtoms upon Conſideration of an Hearth-penny, or that they have other Woodlands whereof they pay Tithes, and by Reaſon of the Wood burnt there the Tithes are bettered, ſo that the Parſon hath a Benefit thereby; but not to alledge a Diſcharge *per Legem Terræ*; and a Conſultation was awarded. *Trin.* 4 *Car.* 1. *C. B.* 1 *Cro.* 113. and *Paſ.* 4 *Car.* 1. *C. B. Hetley* 88. But note; theſe Caſes were 4 *Car.* 1. when Tithes were held more ſacred than now; and the Opinion of the Judges therein ſmells too rank for the Common Law or *Lex Terræ*, which Doubtleſs diſcharged Wood ſpent in the Houſe from paying Tithes.

Note.

And yet we may well admit *Hutton*'s Opinion for good Law, *viz.* that if a Man hath a Houſe of Husbandry, and Lands belong-

ing thereto, if he leaſes the Lands, reſer-
Fire-boot. ving the Houſe, the Tithe of the Fire-wood is payable (by the Leſſee) according to *Hutton.* For here the Land is ſeparated from the Houſe, and ſo cannot be privileged by Reaſon thereof, as Fire-boot. *Hetley* 88, or 93.

Hedge-boot, &c. And by *Harvey, ibid.* If a Libel be for Tithes of Hedging and Fencing, a Surmiſe ought to be made (that they were ſo uſed) to diſcharge ſuch Tithes demanded. See *Hetley* 93. *Thornhill's* Caſe, and *Moor* 917. *Lane's* Caſe.

Alſo it has been generally held by all the Judges, that for Broom, Furze, or any other Fuel expended in the Pariſhioner's Houſe, no Tithe ought to be paid. See 3 *Cro.* 609. *Moor* 909. 1 *Roll. Abr.* 644, *&c.* Nor for any Wood cut for Fencing of Tithable Lands. 1 *Roll. Abr. ibid. &c.* And though all the Wood cut for Fencing be not ſo employed, yet Tithes ſhall not be paid of that which remains. 3 *Cro.* 499.

Houſe for Husbandry. Yet when a Prohibition was prayed to ſtay a Suit for Tithes of Wood, the Plaintiff ſuggeſted that he had a Houſe in the Pariſh, and that the Wood was cut for Fuel burnt in this Houſe; the Court ſaid, that this would not ſerve, unleſs it had been expreſſed that the Houſe was for Maintenance of Husbandry, and that by Reaſon thereof
Uberiores Decimas. the Parſon had *uberiores Decimas.* 1 *Ventr.* 75. 2 *Keeb.* 628. *S. C.*

The foregoing Caſe ſeems to admit, that Wood cut for Fuel to be ſpent in Houſes for Maintenance of Husbandry, is by the

Law of the Land Tithe-free; and yet, when in Order to have a Prohibition, it was ſuggeſted that there was above Four Hundred Acres of Arable Land within the Pariſh, and that the Corn thereon growing could not be preſerved without Fencing the Land whereon it grew; and that the Tithes of the Corn ſo fenced, had always been paid to the Impropriator, &c. and that within the Pariſh there was this Cuſtom, That if any Underwood be cut and imployed in fencing the Corn, whereof the Tithes are to be paid, and do not ſell, nor otherwiſe diſpoſe of it, ſuch Underwood hath been always diſcharged of Tithes; and ſhews, that the Underwood cut was ſo imployed in fencing the Corn, &c. *Fencing Corn.*

In this Caſe it was adjudged that, inaſmuch as it did not appear to be the Plaintiff's own Corn, (although he had averred, that he did not ſell any of the Wood) the Preſcription was not good; for that, if the Plaintiff give his Wood to others to fence their Corn, it would fall within this Preſcription, and yet Tithes ſhall be paid for ſuch Wood. But Serjeant *Wild*, being of Counſel with the Plaintiff, ſaid the Caſe deſerved greater Conſideration than the Court took of it; (*& ſic ſentio.*) See 1 *Sand.* 141. and 2 *Keeb.* 319. *S. C.* *Note.*

If Wood be cut to make Hop-Poles, and ſo imployed, no Tithes are due, where the Parſon or Vicar hath Tithe-Hops. See *Hughes's Abr.* 689. *Hop-Poles.*

Cuſtom guides the Manner.

However, it is agreed, that by Cuſtom Tithes may be paid of Wood conſumed in an Houſe. 1 *Roll. Abr.* 642. And by Cuſtom alſo, upon a Conſideration, Wood ſpent in the Houſe may, without Doubt, be Tithe-free. For (as *Hutton* ſaid) it is a Cuſtom in the *North* Parts to give an Half-penny for Eſtovers burnt, by which they are free from the Tithe of Wood burnt for Fuel. *Hetley* 85. And herein *Crook* and *Yelverton* agree with *Hutton*. *Hetl.* 88. *Litt.* 143.

To burn Bricks.

Alſo if a Man cut his Wood, and burn it, to make Bricks for the neceſſary Enlargement or Reparation of his Houſe, within the Pariſh, for the neceſſary Habitation of him or his Family, no Tithes ſhall be paid thereof, becauſe that the Parſon has thereby the better Benefit of the Labour of his Family. *Hetl.* 93. *Litt.* 5.

But if he cut his Wood, and burn it, to make Bricks for the Enlargement of his Houſe within the Pariſh, more than is neceſſary for his Family, being only for his Pleaſure and Delight, he ſhall pay Tithes thereof; and a Conſultation was granted accordingly, where the Plaintiff in the Prohibition had affirmed, that he burnt it for the Reparation and Enlargement of his Houſe generally, not ſaying for the neceſſary Habitation of his Family. For the Court ſaid, that by this Surmiſe he might make a Caſtle, and yet pay no Tithes. 1 *Roll. Abr.* 656.

Timber Trees. Stat. 45 E. 3. c. 3.

As to Timber-Trees, in ancient Times there was great Controverſy between the Clergy

Clergy and Laity, about the Tithes thereof; which at Length was *Anno* 45 *E.* 3. ſettled by Act of Parliament, as followeth.

Item, At the Complaint of the ſaid great Men and Commons, ſhewing by their Petition, that 'whereas they ſell their great 'Wood of the Age of twenty Years, or 'of greater Age, to Merchants to their 'own Profit, or in Aid of the King in his 'Wars; Parſons and Vicars of Holy Church 'do implead and draw the ſaid Merchants 'into the Spiritual Court, for the Tithes 'of the ſaid Wood, in the Name (or by 'Colour) of this Word *Sylva Cædua*, where- *Sylva cædua.*
'by they cannot ſell their Woods to the 'very Value, to the great Damage of them, 'and of the Realm: It is ordained and 'eſtabliſhed, that a Prohibition in this Caſe *Prohibition and Attachment.*
'ſhall be granted, and upon the ſame, an 'Attachment, as it hath been uſed before 'this Time. See *Stat.* 45 *E.* 3. *c.* 3. *F. N. B.* '51. 2 *Leon.* 79.

By this Statute it is out of Doubt, that Timber-Trees of twenty Years Growth, or more, or that are apt for Timber, are free from the Payment of Tithes, and are ſaid to be Parcel of the Inheritance. See 1 *Roll. Rep.* 100. *Clinton's* Caſe; and *Moor* 908. *Brook* and *Rogers.* *What Timber-Trees are Tithe-Free.*

But ſtill a Doubt remained, what Trees are to be accounted great Wood or (apt for) Timber, by the ſaid Statute, and thereby made free from yielding Tithe? *Reſp.* Firſt, it is evident by the Statute, that none under the Age of twenty Years, of what Sort or *Under twenty Years.*

Benefit ſoever they may be for the Uſe of Building, are ſtrictly by the Words of the Statute accounted great Wood and Tithe-free. 3 *Cro.* 1. 1 *Brownl.* 94.

Standards. And yet I take it, that by the Common Law, and without the Aid of this Statute, young Trees that were apt for Timber, and preſerved as ſuch, as Staddels or Standards are, ought to be excuſed from paying Tithes. And it has been held, that no Tithe is due for Wood of common Right. *Vide poſt.*

Young Oaks, Elms, Aſh, &c. diſcharged. And accordingly it was held by *Wray* and *Clench*, that if one doth cut Trees which are or may be Timber-Trees, as Oaks, Elms, Aſh, *&c.* although they be under the Age of twenty Years, yet no Tithes are due for them. And ſo if Trees of that Age be cut, and new Germins grow from them, no Tithes are due, though they be cut under that Age. 3 *Cro.* 55. and *Moor* 908. S. C.

Houſe-boot, Hedge-boot, &c. v. ante. And it is generally agreed, that if any ſuch young Trees are cut for Houſe-boot, Hedge-boot, Plough-boot, Cart-boot, or Fire-boot, no Tithes are due thereof. *Goldſb.* 145, 172.

Yet it ſeems all Trees, though of twenty Years Growth or more, are not free from Payment of Tithes. 1 *Brownl.* 64. For the *Ratio, &* Statute only intended to diſcharge Timber-Trees, or apt for ſuch, as Oak, Elm, and Aſh; theſe being the moſt uſeful for the Building of Houſes and Ships. *Plow.* 468.

Queſtio. And it is made a *Quære* whether the Parſon by Preſcription can have the Tithe of ſuch Trees, as being againſt the Common Law,

and

and alſo the ſaid Statute of *Sylva Cædua*. 1 *Roll. Abr.* 640.

But as for Beech, *Tanfield*, Juſt. held, that by the Common Law they are not Timber, and ſaid, it was ſo adjudged in *Cary* and *Paget's* Caſe; and therefore of common Right they ought to pay Tithes of what Age ſoever they they be. 1 *Roll. Abr.* 640. *Beech.*

But note; this is only to be underſtood of Beech-Trees growing in ſome woody Countries, where better Timber is plentiful; for in *Buckinghamſhire*, and ſuch like Countries, where Wood is ſcarce, Beech is accounted Timber, and ſhall have the Privilege of being Tithe-free. See 1 *Brownl.* 94. 1 *Roll. Rep.* 355. *Noy* 30. *Moor* 541.

But Birch is not accounted Timber in any Country, nor is it ſuch Wood as the Statute intends by the Name of Groſs Wood, as not being uſeful for Building; and therefore Tithes ſhall be paid thereof, altho' it be not cut 'till it be above twenty Years Growth. See 3 *Cro.* 1. and *Moor* 707. S. C. 2 *Cro.* 199. *Birch.*

And the Law is the ſame as to Willows. *Hob.* 219. *Noy* 30. Though they grow by a Houſe, and it be Waſte to cut them. 1 *Roll. Abr.* 640. ſaid to be reſolved. *Willows.*

And the ſame Law is as to Aſp. *Goldsb.* 161. *Aſp.*

And the like to Holly, Alders, and Maples. 2 *Cro.* 199. 1 *Roll. Abr.* 460. *Holly, Alders, Maples.*

And ſo for Hornbeam, Hazle, Sallows, and ſuch other like Trees of baſe and inferior Nature, and unfit for Building. See *Plowd.* 468. *Hornbeam, Hazle, &c.*

But

But peradventure the Scarcity of other Timber, and Cuſtom of the Country to put ſuch Trees to the Uſes of good Timber, may free them being twenty Years Growth, or under, from the Payment of Tithes. See *Noy* 30. *Co. Lit.*

Timber ſtanding till ſpoiled. Although Trees, once good Timber, ſtand too long, till they are fit for no better Uſe than Firewood, and are cut for that or the like Uſe; yet no Tithes ſhall be paid thereof, for that being once diſcharged of Tithes, they remain alway diſcharged. 3 *Cro.* 477. *Goldsbo.* 145. *Moor* 541. 2 *Cro.* 100. 1 *Roll. Rep.* 100. Yet *Croke* is ſaid, in his Argument of this Caſe, to hold that Tithes ought to be paid for ſuch Trees.

Tithe-free as to the Bark, Roots, and Germins. And note; ſuch Trees as are diſcharged from Payment of Tithes, are free not only as to the Trunk and Timber itſelf, but alſo as to the Bark, Roots, Loppings, *&c.* and alſo all Germins that grow upon the antient Stock. 1 *Roll. Rep.* 100. 11 *Co.* 48. *b.* And alſo, as to the Branches, although they are lopped every ſeven Years. *Moor* 908. and 980. 2 *Cro.* 100. *Godbolt. Soby* and *Molyn's* Caſe. *Plow.* 468. 1 *Roll. Rep.* 100. *Litt. Rep.* 149. *Dr. and Stud.* 175. 11 *H.* 4. 89.

Branches and Lops.

Nor is it material whether they be lopped every twenty Years or not, for they remain ſtill free. *Moor* 762. 3 *Cro.* 477. 1 *Roll. Abr.* 640.

And yet, if Timber-Trees of twenty Years Growth or more, were lopped before they were of that Growth; (in which Caſe ſome think the Loppings are to be tithed) and

and then they are lopped every ten Years or more, Tithes 'tis ſaid ſhall be paid of ſuch Loppings. *Moor* 908. *ſed vide infra.*

But then the Parſon ſuing for the Tithes of ſuch Loppings in the Spiritual Court, if a Prohibition be brought, he ought, in order to have a Conſultation, to alledge and ſhew this Matter in the Temporal Court. 1 *Leon.* 79. 1 *Sid.* 300.

From whence it may be collected, that although the Trees be of more than twenty Years Growth, or ſo old that their Age is not known, and ſo cannot be proved to have been lopped before they were twenty Years old, yet if Tithes of the Loppings have been uſually paid, this may be ſufficient; for it may well be preſumed, that they were lopped before their Age of twenty Years, or elſe they would have continu'd Tithe-free.

Note.

And yet it is ſaid to be formerly held by the whole Court, and which I take to be good Law at this Day. If a Man doth Top a Tree apt for Timber, under the Growth of twenty Years, and ſuffering the Body to remain, doth, after it is Timber and free from the Payment of Tithes, lop it again, no Tithes ſhall be paid of ſuch Loppings. 1 *Brownl.* 33. 1 *Roll. Abr.* 640. For if the Tree be free, ſo are the Loppings or Branches.

Top'd when under twenty, and lopp'd after it is Timber.

But if there be a Wood commonly uſed as Coppice, and the Owner will let it grow 'till it be forty Years Growth, to the Intent it may not pay Tithes, yet when it is cut it ſhall pay Tithes; for one ſhall not by this Means avoid the Payment of Tithes, ſeeing the

the Coppice was in its Nature tithable. 2 *Keeb.* 90. and 1 *Lev.* 189.

Staddels and Standards discharged.

And yet I take it, that Staddels and Standards of Oak, Elm, Aſh, *&c.* growing in ſuch Coppice, if they are intended to grow to above the Age of twenty Years, are thereby become Tithe-free; for theſe are favoured in Law, being as a Nurſery for young Timber, and conſequently fall within the Reaſon of the Statute *de Sylva Cædua.* And ought to be preſerv'd for Building and Shipping, *&c.* on the Reaſon of the Common Law. *Vide ante.*

Trees, &c. growing ſparſim, amongſt Timber, diſcharged.

Alſo, not only the Loppings of Timber-Trees ſhall be free from Payment of Tithes; but thoſe Loppings, as the Caſe may be, may free the Loppings of other Trees, which in their own Nature are tithable, and alſo the Underwood there growing, from yielding of Tithes to the Parſon. For,

If there be a Wood, and the moſt Part of the Trees therein being Timber are free from Tithes, and there grow *ſparſim* amongſt thoſe Trees, other Trees in their Nature tithable, and the Owner fells the whole Wood, and cauſes it to be promiſcuouſly cut down and bound up into Faggots together; here, for that the moſt Part of every Faggot is of Wood Tithe-free, and the Reſidue thereof is of ſo little Value, that the Severance thereof from the Tithe-free Wood would not quit the Charge; therefore in this Caſe no Tithe ſhall be paid for any of the Wood or Faggots.

But

But on the other Hand, if moſt Part of the Wood be Underwood, or Trees tithable when cut, and there grow therein *ſparſim* ſome Oak, Elm, or Aſh, and the Owner cuts down all the Wood, and makes it into Faggots promiſcuouſly; in ſuch Caſe I conceive Tithes are to be paid of the whole, from a Parity of Reaſon. See 2 *Leon.* 79.

And it is ſaid, that in the foregoing Caſe, a Special Conſultation was granted upon a Special Plea, that the Faggots were Part of Wood tithable. And ſee 3 *Cro.* 347. Whereby it ſeems to be taken, That the greater Part being Tithe-free Wood, ſhall free the leſſer Part. *Vide ibid.*

The greater Part of Wood in Faggots, Tithe-free.

However, if in this Caſe only ſome ſmall Part of the Faggots is of Wood Tithe-free, poſſibly put in with Deſign of defrauding the Parſon, and the Parſon ſues in the Spiritual Court for the Tithes of the Faggots, and a Prohibition is obtained upon a Surmiſe that they are made of Wood Tithe-free: Now if the Parſon will have a Conſultation, he muſt ſhew the Special Matter, *viz.* how much of the Faggots were of Tithable Wood, and that the Wood Tithe-free was ſo intermixed therewith, that he could not otherwiſe ſue than for the Faggots, and thereupon pray a Conſultation, otherwiſe no Conſultation is to be granted. 3 *Cro.* 347. *Goldsbo.* 127. and ſee 1 *Sid.* 300. 2 *Keeb.* 90.

Fruit-Trees in a Nurſery.

As Tithes ſhall be paid of Wood and Trees ſold for Fuel, *&c.* as aforeſaid; ſo if young Fruit-Trees, or other like Trees be planted in a Nurſery, or other Place, with Deſign

Deſign to be rooted up, and ſold to be planted in other Pariſhes, Tithes ſhall be paid thereof. See 1 *Cro.* 526. 2 *Jon.* 416, and 1 *Roll. Abr.* 637.

Equity. And Note; upon a Bill in Equity for the Tithes of a Nurſery at the Hearing of the Cauſe, divers Doubts and Queſtions were made and determined, *viz.*

Firſt, Whether Tithes ſhould be paid of Nurſeries, if they yield no other Fruit?

Secondly, Whether Tithes ſhould be paid for thoſe Trees which yield Fruit which pay Tithes?

Thirdly, If ſome Trees yield Fruit and ſome not; Whether ſuch as yield Fruit ſhall privilege and exempt the others that yield none, when ſold together?

Fourthly, Whether Tithes ſhall be paid for them, when they are ſold and tranſplanted within the ſame Pariſh?

And it was decreed, that Tithes were payable in all theſe Caſes. *Mich.* 16 *Car.* 2. *Hardr.* 380.

But the ſecond and the laſt Point ſtill remain dubious with me.

Cuſtoms, &c. freeing Wood from Tithes. But what-ever the Parſon's Due be, as to the Tithe of Wood or Trees of common Right, yet by Cuſtom or Preſcription upon a Conſideration alledged, a Perſon, Town, or Hamlet (or Diſtrict) may be freed from the Payment thereof: As for Example, 1 *Rol. Rep.* 355. *Lapthorns*'s Caſe.

If a Parſon hath a certain Wood, or a certain Parcel of Wood allotted to him by the Lord of a Manor, and that in Conſide-

ration

ration thereof he and his Tenants have been Time out of Memory free from the Payment of the Tithes of their Underwoods, and tithable Trees within the ſame Pariſh, or the like; this is a good Diſcharge. *Ibid.*

Perſons. And in that Caſe, *Coke* ſaid, that in the Pariſh where he lived, Tithes had never been paid of Wood; and that the Parſon had a Wood there called the Tithe-wood: For which he pays four Pence yearly to the Lord of whom he holds it; and therefore it ſhall be intended, that it was given upon a Conſideration for all Tithe-wood, within that Pariſh; for that no Tithe-wood hath ever been paid there. *Ibid.* 1 *Rol. Rep.* 335.

Tithes of Willows. But if one preſcribes to pay a certain Rate for the Tithe of all Willows cut down by him within the Pariſh, this is not good, unleſs he ſay, upon his own Lands. See *Godbolt* 66. So that with ſuch a Limitation, ſuch a Preſcription would be good.

Places. And both *Lindwood*, and *Dr. and Student*, Fol. 166. *b.* ſay, that a whole Country may preſcribe in *non Decimando.*

Wild of Kent. So we find, that in a Suit for the Tithe of Underwood in the Wild of *Kent*, a Prohibition was prayed, upon a Suggeſtion that they had a Preſcription to be diſcharged of the Payment of the Tithes of Underwood growing in the *Wild* there, (which is ſaid to contain about forty Pariſhes). 2 *Bulſ.* 285. 1 *Rol. R.* 22.

But *Coke*, Ch. Juſt. anſwered, that what was ſaid by *Lindwood*, and *Dr. and Student*, was

was with this *Proviſo*, that there be, beſides this, ſufficient Maintenance for the Parſon, otherwiſe it is not good. And that the *Stat.* 2 *Ed.* 6. *c.* 13. did not at all aid in the Caſe. For that no private Man can in this Manner preſcribe; yea, that the Statute was againſt them, although that no Tithes had ever been paid.

Stat. 2 Ed. 6. c. 13.

And he further ſaid, that no Tithes could be paid formerly of Underwoods growing in this Place, becauſe there were only great Timber-Trees there growing, which are free by Law; but now thoſe Trees being deſtroyed by Iron-Mills, and Underwoods grown up in their Place, Tithes ſhall be paid thereof here, as in other Places. And the whole Court was clearly of this Opinion.

But *Dodderidge* ſaid, that by *Lindwood*, and *Dr. and Student*, a whole Country may be diſcharged of the Payment of Tithes; (in general) but this, at the firſt of Neceſſity ought to have a lawful Commencement by Way of Compoſition, or the like, which could not be ſhewn in this Caſe. And with him, *Coke* and the whole Court agreed, and ſo a Prohibition was deny'd. *Vide ibid.* 2 *Bulſ.* 285. *Ruſſel* and *Barkhurſt*. And 1 *Rol. R.* 22. *Porter* and *Tike*.

Note. But to my own Knowledge, no Tithes of Wood are at this Day paid in the Wilds of *Kent* and *Suſſex*, by Reaſon of ſuch Preſcriptions in *non Decimando*, and ſuch Preſcriptions have been conſtantly upon Trials at Common Law allowed to be good.

Non decimando.

And

And ſo *Finch*, Recorder, ſaid it was reſolved in one *Dawley*'s Caſe for the Wild of *Suſſex*, and *Porter*'s Caſe for the Wild of *Kent*; and ſo it was in *Norton*'s Caſe. *Trin.* 4. *Car.* 1. *Hetley* 110. and many others ſince.

So where a Prohibition was granted againſt the Proprietor of the Parſonage of *Tunbridge*, to be diſcharged of the Tithes of Wood, upon a Suggeſtion that it was within the Wild of *Kent*, which, Time out of Memory, had been diſcharg'd of ſuch Tithes: The Preſcription was traverſed, and found for the Plaintiff, and allowed to be good. *Palmer* 37.

And theſe Preſcriptions of *non Decimando* for Wood, have been alſo often allowed for other Places; and this chiefly, as I apprehend, for this Reaſon, *viz. That Wood is not tithable of common Right, but by Cuſtom only*; and therefore, as by Cuſtom Wood is made Tithable, ſo by the like Cuſtom it may be exempt from the Payment of Tithes. But ſuch Preſcriptions *in non Decimando* have never been allow'd to diſcharge Corn, Hay, or any ſuch like Thing, which are of common Right Tithable. *Vide poſt.* Ratio.

And *Note*; It is ſaid, that the Tithe of Wood was firſt introduced to be paid to the Clergy, in the ſeventeeth Year of *Ed.* 3. by a Canon made by *John Stratford*, Archbiſhop of *Canterbury*. See *Palmer* 38. 2 *Rol. R.* 122. *Orignal of Tithe-wood.*

As Tithes are to be paid of divers Sorts of Trees, ſo they ſhall be alſo paid of the Fruits and Produce of ſuch Trees; and although Timber-Trees of the Age of twen- *Tithe of Acorns, &c.*

ty Years or upwards, with the Roots, Germins, Barks and Loppings, be free from yielding of Tithes, yet of Acorns or Maſt ſevered from thoſe Trees, Tithes are to be paid, becauſe theſe renew yearly, and theſe are alſo Predial Tithes. See 11 *Co.* 49. 1 *Rol. R.* 100. *Moor* 762.

if ſold, &c. But then the Acorns muſt be gathered and ſold; for if they in their Seaſon do drop from the Trees of themſelves, and the Owners Hogs do eat them, no Tithes ſhall be paid thereof. *Hetley* 27. *Lit. Rep.* 40. And ſo it ſeems *à fortiori*, where the Owner gathers the Acorns, and gives them to his own Hogs; *ſed Quære.*

Tithe of Fruit-Trees, Apples, Pears, &c. And as of Acorns and Maſt Tithes are to be paid, ſo of the Fruits of all other Trees, whereof Profit is to be made, as of Apples, Pears, Plumbs, Cherries, *&c.*

Which Fruits if they are ſtolen, and not gathered by the Owner, the Parſon as well as the Owner ſhall bear the Loſs. But if the Owner doth ſuffer a Stranger to pull or take his Fruits, the Tithe ſhall be anſwer'd. *Hetley* 100.

And ſo it is (as ſome think) if he ſuffer them to hang too long by Negligence, and after that Time they be imbezled. *Ibid. ſed Quære.*

Orchards ſown, &c. If the Soil of an Orchard is ſown with any Kind of Grain, the Payment of the Tithes of the Fruit of the Trees ſhall be no Diſcharge for the Tithes of the Grain; for they are of ſeveral and diſtinct Kinds. 2 *Inſt.* 652.

But

But if a Man pays Tithes for the Fruit of the Trees, and afterwards doth cut the ſame Trees, or make them into Billets or Faggots, and ſells them, he ſhall not pay Tithes for ſuch Billets or Faggots; for they are no new Increaſe. 2 *Inſt.* 651, 622. *Ratio.*

And Note; in many Places, by Cuſtom ſome ſmall Rate, as four Pence, or the like, is to be paid as the Tithe of the whole Orchard or Garden; and if in any Place where ſuch Preſcription is, a new Orchard be planted, the Owner ſhall be Tithe-free thereof, paying only the accuſtomary Rate, as for the old Orchard. *Hetley* 85. *Note.* *Gardens.*

And yet, by *Hutton*, if a Man has an antient Garden, for which he paid a Penny yearly, and the Garden is afterwards enlarged, of that Enlargement Tithes ought to be paid in Specie. *Hetley* 94. *enlarged.*

But the Reaſon of this Caſe I ſuppoſe is, becauſe the Preſcription was particular for that Garden only. But if the Cuſtom of the Pariſh had been to have paid yearly a Penny for each Garden in the Pariſh, there the Addition to, or Enlargement of a Garden, would not make any Tithes due in Specie. *Ratio.*

And Note; if no ſuch Cuſtom be as aforeſaid, Tithes are due of all Garden Herbs, and Roots, as Mint, Parſley, Annis, Rue, Sage, Cabbage, Turneps, Potatoes, *&c.* But theſe are ſmall or minute Tithes. *Garden Herbs, ſmall Tithes.*

Alſo Tithes ſhall be paid of Rape-Seed, Saffron, Hops, Flax, Woad, Hemp, Weld, and of the like Fruits yielded by the Earth; *Rape-Seed, Saffron, and other Predial minute Tithes.*

and theſe are to be accounted Predial minute Tithes. See *Palmer* 222. *Hutton* 77. 1 *Cro.* 28. *Benlows* 139, 159.

3 Lev. 365. *and* 4 Mod. 183.

And by three Judges, Flax, Hemp, Milk, Wool, Honey, Tobacco, Hops, *&c.* are in their Nature ſmall Tithes, though in large Quantities. 3 *Lev.* 365.

Hops.

And as to Hops, the Owner is not bound to dry or ſort them before the Tithes are ſet forth. 1 *Rol. Abr.* 644. And how the Tithes of Hops ſhall be ſet forth, *i. e.* whether by the Tenth Pole or by Meaſure, is not agreed, as is ſaid by *Twiſden*, Juſtice. 1 *Sid.* 283. *Vide ibid.* 443.

No Modus.

Alſo note; there can be no *Modus* for Tithe-Hops, becauſe the Court will take Notice, that Hops have not been antient, but uſed in Beer of late Times only, being firſt introduced into *England*, *Circ. Ann.* 1524. Yet a Preſcription to pay ſo much in Lieu of all ſmall Tithes, may include Hops and ſuch other ſmall Things of new Invention. See 1 *Sid.* 443. 1 *Ventr.* 61. 2 *Keeb.* 612.

Honey and Bees-Wax. Vide poſt.

The Tithe of Honey, and the Wax of Bees, is alſo eſteemed a Predial Tithe; And this in the Hive, *&c.* ought *de Jure* to be paid in Kind, as was adjudged in a Prohibition upon a Demurrer. 1 *Roll. Abr.* 635. *Barefoot's* Caſe. And 1 *Jones* 447. S. C. See alſo 1 *Cro.* 559. *F. N. B.* 41. A. *Rep. Canon.* 389. *Et Quære.*

Preſcription.

But when one preſcribed to be diſcharged of the Tithe of the tenth Swarm of Bees, in Conſideration that he paid the Tithe of the Honey and Wax, and fed them in *Winter* and found them Hives; and (for that they

they were *Feræ Naturæ*) took great Care, and ſpent much Labour to preſerve them when they ſwarmed; a Prohibition was granted on theſe Surmiſes. 1 *Cro.* 404.

And yet ſome of the Judges there hold that the *Modus* is not good, for that Conſideration is no more than the Duty that the Law requires. (*Quære*) But they agreed that no Tithes were due of the tenth Swarm, for that Bees are *Feræ Naturæ*. 1 *Roll. Abr.* 651. Modus.

The Tithes of Hemp and Flax are alſo Predial, but varied in the Denomination of great or ſmall Tithes, according to the Quantity of Ground within the Pariſh, that is ſown therewith; for if ſown in large Fields or great Parcels, it is denominated a great Tithe; but if in Gardens or in ſmaller Parcels, it is properly only a ſmall Tithe. *Hemp and Flax. See* Cumberbach 201, 209. *That they are properly* minutæ Decimæ.

And whereas formerly divers Diſputes aroſe about paying the Tithe thereof in Kind, in Order to prevent the like Diſputes for the Future, a *Modus* at firſt, not exceeding 4*s.* and afterwards not exceeding 5 *s. per* Acre, was eſtabliſhed by Act of Parliament, *viz.* *A* Modus *appointed by* Stat. 3, 4 W. M. c. 3.

The Act 3 & 4 *W. & M. c.* 3. *For the better aſcertaining the Tithes of Hemp and Flax*, enacts, 'That all Perſons that ſhall ſow, or 'cauſe to be ſown, any Hemp or Flax, 'in any Pariſh or Place in *England*, *Wales*, 'or *Berwick*, ſhall pay, or cauſe to be paid, 'to every Parſon, Vicar, or Impropriator 'of any ſuch Pariſh, or Place, yearly and 'every Year, for each Acre of Hemp or

'Flax ſo ſown, pulled, or drawn, a conſtant annual Sum of Money, not exceeding 4 *s.* before the ſame be carried off the Ground, and ſo proportionably for more or leſs Ground ſo ſown, and pulled, or drawn, as aforeſaid. For the Recovery of which Sum or Sums of Money, the Parſon, Vicar, or Impropriator ſhall have the common and uſual Remedy allowed by the Laws of *England*.

Not to alter other Modus's.

'Provided, That this Act, nor any thing therein contain'd, ſhall not extend to charge any Lands diſcharged by any *Modus Decimandi*, or antient Compoſition, or otherwiſe diſcharged of Tithes by Law.

Continuance.

'Provided, That this Law ſhall continue for ſeven Years, and to the End of the next Seſſion of Parliament after the ſaid ſeven Years are expired'.

But this Act being expired, a ſubſequent Act was made, 11 & 12 *W.* 3. which enlarged the *Modus* of 4 *s. per* Acre, to 5 *s.* and more fully enforced the former Act, as follows:

Stat. 11 & 12 W. 3. c. 16.

'Whereas an Act made in the Third Year of the Reign of his preſent Majeſty, and the late Queen, entitled, *An Act for the better*, &c. was made to continue but for ſeven Years, and to the End of the next Seſſion of Parliament after ſuch Term ended, and is now expired; and whereas the ſaid Act hath by Experience been found very uſeful and neceſſary, Be it therefore enacted, by, &c. that from 25 *March* 1700. all and every Perſon or Perſons, who ſhall ſow, or cauſe

'to be ſown, any Hemp or Flax in any 'Pariſh or Place in *England*, *Wales*, and '*Berwick*, ſhall pay or cauſe to be paid 'to every Parſon, Vicar, and Impropriator 'of any ſuch Pariſh or Place, yearly and 'every Year, the Sum of 5 *s.* and no more, 'for each Acre of Hemp or Flax ſo ſown, 'before the ſame be carried off the Ground, 'and ſo proportionably for more or leſs 'Ground ſo ſown: For the Recovery of 'which Sum or Sums of Money, the Par-'ſon, Vicar, or Impropriator ſhall have the 'common and uſual Remedy allowed of by 'the Laws of the Land.

Modus's.

'Provided, That this Act, or any Thing 'therein contain'd, ſhall not extend to charge 'any Lands diſcharged by any *Modus Deci-'mandi*, antient Compoſition, or otherwiſe 'diſcharged of Tithes by Law.

Proviſo *for Ground formerly ſown.*

'Provided always, That Nothing here-'in contained, ſhall extend or be con-'ſtrued to extend to make any Alteration 'in the Right or Manner of Payment of 'Tithes of Flax or Hemp to any Eccleſi-'aſtical Perſon, Incumbent of any Parſon-'age, Vicarage, or Curacy, or to any Im-'propriator, or Body corporate, having 'or holding any Impropriation, for ſuch 'Ground as hath, at any Time ſince the '2d Day of *Febr.* 1684. and before the '2d Day of *Febr.* 1691. been ſown with 'Flax or Hemp, and paid Tithe in Kind 'to ſuch Incumbent, Impropriator, or Body 'corporate reſpectively, but that the ſame 'ſhall continue and be payable, and paid as 'fully, and in ſuch Manner as formerly,

Quære *the Reaſon of this Limitation.*

'any Thing in this Act to the contrary notwithſtanding.

'And this Law to continue in Force for 'ſeven Years, from the ſaid 25th of *March* '1700. and thence to the End of the next 'Seſſion of Parliament, and no longer.'

Which laſt recited Act was by an Act paſſed 6 *Annæ c.* 18. continued for ſeven Years, from the 25th of *March* 1708. and thence to the End of the next Seſſion of Parliament, and no longer. But by a ſubſequent Statute, *viz.* 1 *Geo.* 1. *Stat.* 1. *c.* 2. *Sect.* 8. it is now made perpetual.

Note. Quære, *If the above Statutes were made at the Inſtance of the Clergy, or of Lay Impropriators? And whether Lay Impropriations are not the beſt Security for the Payment of Tithes? And whether the Clergy's Proceeding in purchaſing Impropriations will not weaken that Security? for the Clergy's Zeal to advance what they call the Intereſt of the Church, ſeems herein already to have exceeded the Bounds of Prudence, and the Publick Good.*

Hemp and Flax great or ſmall Tithes. And note; in the Caſe of *Wharton* and *Liſle, Trin.* 5 *W. M.* three of the Judges in *B. R.* held that Hemp, Flax, *&c.* as well growing in Fields in great Quantities, as in Gardens and Backſides, are only minute or ſmall Tithes. But *Holt*, Ch. Juſt. held (and it ſeems with better Reaſon) that they are minute Tithes when they grow only in Gardens, *&c.* But if they are ſown or grow in open Fields, they are great Tithes, be the Quantity more or leſs. See 3 *Lev.* 365. and 4 *Mod.* 183. S. C.

See alſo the Caſe of *Pool* and *Reynolds* in *C. B.* in *Hutton*, where the Vicar brought Treſpaſs againſt the Parſon for taking of two *carectat. Glaci*, *anglice* Woad; the Jury found ſpecially for Half a Cart-load, and concluded, *Quod ſi videbitur Curiæ, quod Decimæ Glaci non ſunt Minutæ Decimæ*, then the Defendant was not guilty; *ſed ſi ſunt minutæ Decimæ*, then guilty. And on Argument by *Bridgeman* and *Henden*, Serjeants, the Court unanimouſly agreed, that for ought here appears (the Verdict being found without any Circumſtance of its being great Tithes) this Woad ſhall be taken to be *minutæ Decimæ*. *So of Woad.*

Hendon argued, That if it had been found Woad growing in a Garden, then *minutæ*, but if in a Field, *&c. majores Decimæ, &c.* And the Court agreed that it might have been ſo found, as to make it *majores Decimæ*, and Predial; as if all the Profits of the Parſonage had conſiſted of ſuch Tithes; and ſo of other Things which in their own Nature are *minutæ*, they become *majores*, if all or moſt of the Parſonage Profit conſiſt therein; as in ſome Places, where a great Part of the Lands in the Pariſh are ſown with Hemp, Flax, or Hops, there they are great Tithes; and ſo it may be of Wool and Lambs, Saffron, Tobacco, *&c.*

But note; if it does not appear, by material Circumſtances found in the Verdict, to the contrary, all theſe (as they are in their own Nature) ſhall be taken to be ſmall Tithes. *Vide Rep. Canon.* 365, 366. and the Caſe of *Wharton* and *Liſle*. *Paſ. 5 W. M. Cumb.* 201, 209.

And

And note; all Predial Tithes, whether ſmall or great, are due only of ſuch Things as, ariſing *ex prædio*, do annually renew; and therefore cannot of common Right be for Mines of Oar, Coals, Stone, Slate, *&c.* which have no certain annual Produce; yet a cuſtomary Tithe may be payable for theſe Things. *Vide poſt* ſee alſo 2 *Vern.* 46. and by *Stat.* 2 *E.* 6. *c.* 13. it is enacted, That at the Tithing-Time of Predial Tithes, it ſhall be lawful for every Party, to whom any Tithes ought to be paid, or his Deputy or Servant, to ſee the ſaid Tithes ſevered from the nine Parts, and the ſame quietly to take and carry away. See hereafter Chap. 5. this Statute explained.

And note; under the Head of this Chapter might be properly ſhewn, where and in what Caſes Predial Tithes are payable or not, in Reſpect of the ſeveral Kinds or Qualities of Lands that are charged therewith, or diſcharged therefrom, *viz.*

Abbey Lands, Barren Lands, Crown-Lands, Fenny Lands, Foreſt Lands, Head-Lands, Improved Lands, Lands let to Inhabitants of other Pariſhes; as alſo the Lands of Commons, Paſtures, Parks, Warrens, *&c.*

But as the Treating of theſe Particulars in this Place, would ſeem variant from the precedent Matter, and disjoint the intended Connection of our Diſcourſe, we ſhall poſtpone their Conſideration to ſome more convenient Place, and hereafter reduce the whole into its proper and diſtinct Chapter.

CHAP.

CHAP. III.

Of Mixt Tithes, and their ſeveral Kinds, as of Cattle, viz. Horſes, Oxen, Cows, Sheep, Hogs, &c. and their Young; Milk, Cheeſe, and Wool; Agiſtments, &c. when and in what Manner payable, and what Modus, *Cuſtom, or Preſcription is good, or not, therein; as alſo of the Tithes of Deer, Hares, Conies, Turkies, Geeſe, Ducks, Hens, Pidgeons, &c.*

Mixt Tithes

HAving in the precedent Chapter diſcours'd of *Predial Tithes* at large, and ſhewn their ſeveral Kinds, Natures, Qualities, and Incidents in particular, we ſhould now, according to the Method propos'd, proceed to treat of Perſonal Tithes in like Manner, but conſidering that Mixt Tithes do bear a nearer Analogy to Predial, and in ſome Caſes can ſcarcely be diſtinguiſh'd from them, we ſhall, as moſt conſonant to the natural Order of Things, and as more coherent to the Subject Matter of the precedent Chapter, proceed to treat of

Mixt

Deſcribed. *Mixt Tithes:* Which principally ariſing from the ſeveral Creatures which are fed and nouriſh'd by the Fruits or Produce of the Earth, do, as is ſaid before, participate of both Qualities, Predial and Perſonal, and are therefore call'd *Mixt*.

Their Kinds. And firſt we ſhall Treat of ſuch of them wherewith the Farmer or Owner is accuſtomed to ſtock or paſture his Lands, as

Cattle and Horſes, Oxen, Cows, Sheep, Goats, Hogs, *&c.* (and afterwards of Deer, Hares, Conies, Turkies, Geeſe, Ducks, Hens, Pidgeons, *&c.*)

their Young. To which may be added, the Young of ſuch of thoſe before named, which may yield their Tithe in Kind; for if a Man

One in Ten. hath Ten Colts, Calves, Lambs, Kids, or Pigs, in one Year, one of them ſhall be to the Parſon or Vicar, *&c.*

If leſs, pro Rata. But if he hath a leſs Number of any Sort, the Parſon, *&c.* can have no Tithes in Kind of them for that Year, without a Special Cuſtom for it, but muſt have his Tithe *pro Rata*, either in Money the ſame

How to be accounted. Year, or if the Cuſtom ſo directs, tarry 'till the next Year, and then take his Tithe in Kind, reckoning both the Years together.

And yet by Cuſtom, tho' ſuch Young are fewer than Ten, the Parſon may have one of them in Kind every Year; as, if there be only Seven, the Parſon to have one; and if there be a leſs Number than Seven in one Year, the Owner to pay a Half-penny for each of them, is a good Cu-

One in Seven. ſtom. But where the Cuſtom is, That he

ſhall

ſhall have one of Seven, as of Calves, Pigs, *&c.* there he ſhall not account the Young in two Years, and ſo the 2d Year have one in Kind, but only have a Half-penny for each of them in both Years. *Latch* 254.

If a Man hath but one or more Calves, Colts, or Lambs, *&c.* and ſells them; by the Cuſtom in many Pariſhes, he ſhall pay to the Parſon the 10th Penny of the Price they are ſold for. *Calves, &c. ſold.*

And Note; Cuſtom in theſe Caſes generally directs the Payment, and is therefore to be ſtrictly obſerv'd. *Cuſtom to direct the Payment.*

It is ſaid to be a good *Modus* for the Tithe of Calves, to pay one Calf for the Tithe if the Owner hath ſeven in one Year; and if he has under ſeven, to pay a Half-penny for each of them; and that if he ſells any Calf, that he ſhall pay the Tenth of the Price for which he ſold it. 1 *Roll. Abr.* 640.

But if a Man preſcribe to pay one Half-penny for every Lamb that he ſhall ſell before the firſt Day of *May*, without other Tithe of them, and he by Fraud, to deceive the Parſon, ſells his Lambs but one or two Days before the firſt of *May*, this is no Diſcharge by the Cuſtom from paying Tithes in Kind. 1 *Roll. Abr.* 651. *Fraud in Selling.*

And as the Parſon is to have the Tithes of the Young, and Encreaſe of theſe Cattle, ſo he on his Part is to obſerve the Cuſtom of the Place, for the better propagating of their Increaſe, elſe any Pariſhioner griev'd may have an Action of the Caſe againſt him,

him, as in the Case of *Yeilding* and *Fay*. 3 *Cro.* 569, and *Moor* 355, *viz.*

Custom to keep a common Bull and Boar.

An Action of the Case was brought against a Parson declaring, that within the Parish there is a Custom, that the Parson at all Times of the Year had used to keep a common Bull, and a Boar, for the common Use of the Kine and Sows of the Parishioners, for the Increase of Calves and Pigs within the Parish; and that the Defendant being Parson there, had neglected to keep them, by Reason whereof the Plaintiff being an Inhabitant, *&c.* had lost the Increase, *&c.* and the Court were of Opinion, that this was a reasonable Custom, and that every Inhabitant, prejudiced by the not keeping the Bull and Boar, might maintain the Action. *Vide ibid.*

A. libell'd in the Spiritual Court for the Herbage Tithe of young Cattle, *viz.* a Penny for every one; and on Motion for a Prohibition, 'twas said, that for young Beasts brought up for the Pail, Cart, or Plough, no Tithes are due; and so it has been adjudg'd. *Vide Rep. Canon.* 367.

It was also said, that a Prescription for Tithes of Hedging Stuff cannot be maintain'd, because that preserves the Land and Grain, *&c.* out of which the Tithes arise;

Barren Cattle.

nor can they have Tithes for the Pasturage or Gains of barren Cattle, except by Custom.

And by *Hutton* and *Yelverton*, If they claim Tithes of any Things before they come to Perfection, which Things are titheable afterwards when they come to Perfection,

fection, a Prohibition ſhall go; yet a Cuſtom may be to have every Year a Penny for them; and if they are ſold before they come to Perfection, Tithes ſhall be paid for them. See *Woolmerſton*'s Caſe in *Hetley*'s *Reports*, and *Rep. Canon.* 367.

See of Sheep, Lambs, Horſes, Colts, &c. *poſtea.*

And Note; of common Right, young Cattle are Tithable when they are weanable, that is, can live without the Dam, of ſuch Food as the Dam herſelf is nouriſh'd with; and the Tithe of theſe is to be apportion'd and modify'd with reſpect to the Cuſtom of the Places where they are engender'd, brought forth, and nouriſh'd. *When Tithable and how.*

Alſo where Cattle yield other Profit to the Owner, beſides their Young, the Tithe of ſuch Profit is to be paid to the Parſon, as of the Milk of Cows. See 2 *Brownl.* 60, and, on the like Reaſon, that of Aſſes, and of Goats and Sheep, when their Milk is preſerved by the Owner. *Tithe of Milk.*

But where one ſurmiſed, that the Cuſtom of the Country where he liv'd, was not to pay any Tithes of Milk of Ewes, a Prohibition was granted *per Curiam.* 1 *Rol. Abr.* 654.

But by Cuſtom a certain Number of Cheeſes may be paid in Diſcharge of the Tithe of Milk. See *Godbolt*, *Wiſeman* and *Dennis*'s Caſe. *Cheeſe.*

So a Cuſtom to pay the 10th Cheeſe made from the 1ſt of *May* to the 1ſt of *Auguſt*, in Recompence of all Tithe Milk for the whole Year, is a good Diſcharge of the

Tithe

Tithe of Milk, for that Cheeſe comes by Labour, and the Tithe thereof is not due of it ſelf.

So, to pay the Tenth Quart or Tenth Meal of Milk at the Parſonage-Houſe, or other certain Place, is good enough. 3 *Cro.* 609. and *Moor* 909. S. C.

If Tithe-Milk, no Tithe-Cheeſe.

But note, That as when Tithe-Milk is paid, no Tithe-Cheeſe is due. So when Tithe-Cheeſe is paid no Tithe-Milk is to be required; and that when Cows yielding Milk are ſold, or otherwiſe removed into another Pariſh, the Tithe of Milk for the Time is to be paid to the Pariſh where they are depaſtured.

Prohibition to a Suit for Tithe-Milk. 6 Mod. 261.

And note the Caſe of *Leiceſter*, v. *Foy*, *Mich.* 3 *Annæ B. R. viz.* A Prohibition was moved to ſtay a Suit by a Vicar in the Spiritual Court for Tithe-Milk, upon Suggeſtion of a *Modus* that the Inhabitants of that Place did, from ſuch a Day in *April* 'till *All-Saints* Day, pay every Tenth Day's Milk skimm'd and made into Cheeſe, and that *ratione inde* they were diſcharged of all Tithe-Milk.

And *Eyre*, againſt the Prohibition ſaid, it is true that making the Tithes of one (firſt) Crop into Hay will be a good Cauſe of the Diſcharge of Tithe of the After-Mouth; but he denied that it would be a good *Modus* to ſay, that for making the After-Mowth into Hay they ſhould be diſcharged of the Tithe of the firſt Crop; and that the *Modus* here alledged amounts to a *non Decimando* of the Cream.

But for the Prohibition was urged *Cro. El.* 609. and *Moor* 909. a *Modus* to pay the Tenth Cheese made from such a Time to such a Time, in Lieu of all Tithe-Milk; which, though it be but for Part of the Year, yet being what they are not bound to do, is a good Discharge of Tithe-Milk for all the Year. See *Raym.* 277. *Latch* 222. And suppose it were to pay a Groat a Year for all Tithe-Milk, that would be well: And why not this?

And though the Court did not like the *Modus*, as seeming very hard on the Vicar (to be disappointed of his Cream) yet to settle the Point, which they thought of great Consequence, they granted a Prohibition in Order to try the *Modus*, and directed the Plaintiffs to declare therein forthwith. See 6 *Mod.* 261. Curia.

See also the Case of *Hill.* v. *Vaux. Mich.* 10 *W.* 3. *B. R.* 2 *Salk.* 656. *viz.* On a Suit in the Spiritual Court for Tithe of Milk, the Plaintiff moved for a Prohibition, suggesting a Custom in the Parish, that the 9th of *May* at Night, and the 10th of *May* in the Morning, the Parson was to have the whole Meal's Milk, and so every ninth and tenth Night and Morning, 'till a young Lamb yeaned should be heard to bleat, in Lieu of all Tithe of Milk; and the Case of thirty Eggs in Lieu of all Tithe of Eggs was cited. 1 *Roll. Abr.* 648, 651. *A* Modus *to pay a whole Meal's Milk such a Day, and so every ninth and tenth Night and Morning, 'till a young Lamb bleated, &c. in Lieu of all Tithe-Milk, is ill.*

And *per Cur.* a *Modus* to pay one Thing for another, or a Part of the same Thing *A* Modus *to pay Part of the very Thing that is Tithe, not Good, unless payable in another Manner.* 2 Salk. 656, 657.

in another Manner, may be good; but a Preſcription to pay the very Thing that is Tithe, can never be a good *Modus*, unleſs payable in ſome other Manner, *i. e.* ſo as the Parſon has a Benefit by it. See 3 *Cro.* 609. 2 *Cro.* 47. 1 *And.* 799. 1 *Mod.* 229. *Hob.* 250. *Raym.* 277. 3 *Bulſt.* 326.

As to the Caſe put of the thirty Eggs, the Court held he is bound to pay them, whether he has Hens or no; and he muſt pay them at a certain Time. But by this *Modus* the Parſon may have Nothing; as ſuppoſe a Lamb be heard to bleat before the 9th of *May*, (*Quære* if a juſt Inference?) See the Caſe of the Archbiſhop of *York*, &c. *infra*.

Tithe-Milk, how payable, Raym. 277.

In a Suit for ſmall Tithes by *Engliſh* Bill in the Exchequer, and amongſt the reſt for Tithe of Milk, upon hearing of the Cauſe, two Queſtions aroſe; which were decreed as follow,

1. Whether the Defendant ſhould pay a tenth Part of the Milk every Meal, or only pay every tenth Meal entire? And it was decreed that he ſhould pay every tenth Meal entire.

and where.

2. The ſecond Queſtion was, Whether *de Jure* the Pariſhioners ought to ſend the Tithe-Milk to the Parſonage-Houſe, or that the Parſon ought to fetch it from the Pariſhioners? And it was agreed by the whole Court, That it ought to be carried by the Pariſhioners. And by the Chief Baron and two other Barons, to be delivered in the Church-Porch, becauſe the neighbouring Pariſhes did ſo; but by *Raymond*, it ought to be carried to

the Parſonage-Houſe, becauſe where there is no Cuſtom, the Common Law muſt take Place. See *Raymond's Rep.* 277.

But *Quære* the Reaſon of this ſecond Reſolution, and how the Tithe of Milk becomes different from other Tithes; which generally are to be ſet out, and rendered in the Place where they ariſe, and the Pariſhioner is not compellable to deliver them at the Parſonage-Houſe, Church-Porch, or any other Place than where they ariſe. *Quære.*

And note; though it was ſaid by *Hutton* in *Spencer's* Caſe, that by the Civil Law the Pariſhioners ought to give Notice to the Parſon when the Tithes are ſet forth; yet the Court adjudged, that the Common Law does not oblige one thereto. See *Noy's R.* 19. and note well 2 *Ventr.* 48, 49.

Alſo the Tithe of the Wool of Sheep and Lambs is to be paid to the Parſon or Vicar, or other Proprietor of the Tithes, *viz.* proportionably for ſuch Time as they are fed or remain in the Pariſh, as thus, *viz.* eight Pounds of Wool in Eighty, of forty Sheep, if fed in the Pariſh a whole Year; four Pounds of Wool if they were there but Half a Year, two Pounds of Wool if there but three Months, and but the Tithe or Tenth of the twelfth Part of the Wool, if they lay and fed but one Month in the Pariſh. See 2 *Keeb.* 293. But no Tithe is due where they are kept leſs than thirty Days in a Pariſh. See *Degg* 255. And it is ſaid, where Cows lodge in one Pariſh and feed in another, the Tithes ſhall be divided. *Sed Quære, & vide poſt.* *Tithe of Sheep and Wool.* *How and*

when payable. And note; the Payment of the aforeſaid Proportion is due *de Jure*, at the Time when it is clipped; but by Preſcription it may be ſet out all together at any other Time; and if the Spiritual Court will not allow of ſuch Preſcription, they are to be prohibited. *Moor* 910. See 3 *Cro.* 702.

And by the Opinion of *Jones*, if a Pariſhioner ſell his Sheep, the Parſon ſhall have Allowance for the Tithes of them after their Shearing. *Latch* 254.

Alſo, where the Owner of the Sheep had depaſtured them in the Pariſh from *Michaelmas* to *Lady-Day*, and then ſold them, and a Suit was in the Spiritual Court for a tenth Part of the Bargain; and the Owner to have a Prohibition ſurmiſed, That he would pay the Tenth of the Wool of them according to the Cuſtom of the Pariſh; a Prohibition was deny'd *per Cur. Poph.* 197.

For, as *Dodderidge* Juſtice ſaid, by this Way the Parſon ſhall be defrauded of all, if he ſhall not now have his Recompence. For that it was not the Time of Shearing when they were ſold, and the Sheep are now gone into another Pariſh. And *Whitlock* ſaid, that *de animalibus inutilibus*, the Parſon ſhall have the tenth Part of the Bargain for depaſturing them, as Horſes, Oxen, *&c.* But *de animalibus utilibus*, as Cows, Sheep, *&c.* he ſhall have the Tithe in Specie. *Poph.* 197.

De animalibus inutilibus, &c.

Lambs. So if a Man doth pay the Tithe of Lambs at *Mark's Tide*, and at *Midſummer* following doth ſhear the Reſidue of his Lambs, *viz.* the nine other Parts, he ought to pay Tithes of

of their Wool alſo; although there is not above two Months betwixt the Time of the Payment of the Tithes of the Lambs, which were tithed with their Fleeces, and the Shearing of the Reſidue, for this is a *New Increaſe*; and a Prohibition was deny'd accordingly. 1 *Rol. Abr.* 642. *New Increaſe.*

Note alſo; the Caſe of the Archbiſhop of *York v.* the Duke of *Newcaſtle*, *Mic.* 3. *Ann. in Scaccario*, as reported in 2 *Salk.* 656, 657. was thus: *A.* preſcribed to pay ten Fleeces of Wool, and two Lambs, in lieu of all Tithes; and *Price* and *Bury*, Barons, were of Opinion that this was an ill *Modus*, becauſe it was one Species of Tithe for another: Alſo there is great Incertainty therein, for one Fleece may be twice as big and three Times the Value of another. See 2 *Lutw.* 1052. 3 *Cro.* 276, 786. *Moor* 909. 1 *Rol. Abr.* 649. *Dyer* 149. *Hard.* 174. *A* Modus *of ten Fleeces of Wool, and two Lambs, for all Tithes; the Court divided, if good or not.*

But *Ward* Ch. Baron, and *Smith* Baron, held *contra*, *viz.*

1. That a *Modus* is nothing but a real Compoſition for, or in lieu of, Tithes, or an annual Profit certain and permanent. Modus quid,
2. That the Payment of any one Chattel for Tithe, was or might be a good *Modus*, as well as Money; for why might not the Parſon originally agree to take ten Fleeces for his Tithe, as well as a Penny. *and what good.*
3. They admitted, that Payment of Tithes of one Species, or Payment of a *Modus* for one Species of Tithes, could

not be a Diſcharge as to another Species. But

4. They held, that this was not a Payment of Tithe, nor a Payment for a Species of Tithe, becauſe it was to be paid at all Events, whether there be Sheep or no.

5. They deny'd the Caſe of 1 *Rol. Abr.* 651. and held it no more uncertain, than to pay a *Modus* of *Ten Cheeſes*, which may differ vaſtly both in Nature, Quantity, and Value. *Vide ante.*

6. That it tends to the Diſquiet of a Country, to break in upon Cuſtoms and Uſages; and that it ought not to be done but on plain and manifeſt Reaſons. See 2 *Salk.* 656, 657.

Note. And note; the Opinions of *Ward* Ch. Baron, and *Smith* Baron, ſeem to be highly rational and concluſive; and, had they been concurr'd in by the two other Barons, would have ſettled divers Cuſtoms and *Moduſſes* touching the Payment of Tithes, and conſequently have prevented many Suits that have ſince ariſen thereupon.

Neck Wool, &c. Q. Alſo ſome are of Opinion, That not only the Tithe of the Wool upon the Bodies of the Sheep or Lambs, but alſo that of the Head and Neck, Tail, Locks, *&c.* tho' cut off before Sheering Time, is due and payable; which may be true, if what is ſo cut off be converted to the Owner's Uſe or Profit. And this has ſome Colour of Reaſon; for that, in Order to avoid the Payment of Tithes for it, the Neck-Wool is often fraudulently

dulently taken off to the leſſening the Weight and Value of the Fleece.

See for this the Caſe of *Foſſe* v. *Parker & al. Mich.* 14 *Jac.* 1. *B. R.* where this Matter is debated; and when it was there urged, that if ſuch Abuſe was in the cutting off of the Neck-Wool, *&c.* it ought to come on the other Side, to ſhew it to be ſo, as in the Caſe of *Rakings*; the Court at firſt was againſt this, and at the ſame Time refuſed to grant a Prohibition: But at another Day, on Suggeſtion and Proof that they uſed to wind up the Fleeces at their own Charge, *&c.* This was held a good Conſideration for the Neck-Wool, and a Prohibition was accordingly granted. See 3 *Bulſt.* 242. 1 *Rol. Abr.* 645, 646. *Lit. Rep.* 31.

Locks of Wool Tithe-free.

And when one preſcrib'd, that he paid the Tenth Fleece of Wool, in Satisfaction of all Locks and Tithes due for Wool, tho' it was mov'd that the Preſcription was not good, becauſe it is no more than to have the ſame Thing of the ſame Nature in Recompence; yet the Court held, that the Subſtance of the Preſcription was good, and that the Locks being but of ſmall Value, were Tithe-free, 3 *Co.* 363. and note; it ſeems to be there reſolv'd, that where Tithe-Fleeces of Wool are paid, there ſhall be no Tithe paid of the Locks and Pelts. See *Deg.* 257.

But ſee *Moor* 911. That a Preſcription to be diſcharged of the Tithes of Locks of Wool ought to be ſhewn, though the Locks were caſually loſt. *Quær. ibid.* 3 *Bulſt.* 242. 1 *Rol. Abr.* 645. Z. 14, 15, 16.

Dirty Locks cut off. Alſo, if a Pariſhioner doth cut off the dirty Locks from his Sheep before the Time of Sheering, the better to preſerve them from Vermin, and this be done without Fraud, no Tithes ſhall be paid thereof; *per Cur.* 1 *Rol. Abr.* 646. eſpecially if the Pariſhioner can preſcribe for it, in Conſideration, that he is to wind up the Parſon's Tithe-Fleeces, *&c.* See *Williams* and *Wilock's* Caſe.

Sheep dying after Sheering. If Sheep be ſhorn, and die of the Rot or other Diſeaſe before the *Eaſter* following, their Wool is not tithable, unleſs the Parſon can preſcribe to have it, *F. N. B. Conſultation* 51. But by *Doddridge* and *Jones*, If a Man's Sheep die of the Rot, or other Diſeaſe, or the Owner kill or ſell them, he muſt pay Tithe for the Wool ratably. *Latch* 254. But ſee 1 *Rol.* 646. Z. 18. If a Man doth kill his Sheep, he ſhall pay Tithe for their Wool, but not for the Pelts or Skins.

Sheep kill'd, But for the Carcaſſes or Bodies of Sheep fed on his Lands in his Pariſh, and eaten in his Houſe, no Tithes ſhall be paid; *per Cur'.* 1 *Rol. Abr.* 647. *&* 1 *Cro.* 237. Nor for their Wool neither, if wrought up and ſpent, or uſed in the Family. (*per W. B.*)

Or ſold. If a Man keep Sheep in one Pariſh, 'till Sheering Time, and then ſell them into another Pariſh, in this Caſe, *per Williams* (Juſt.) the Vendee ſhall pay the Tithe-Wool to the Pariſh where they were depaſtured in the greater Part of the Time of the growing of the Wool. *Moor* 911.

But if there be a Preſcription, that the Owner of the Sheep ſhall pay a Half-penny for

for the Wool of Sheep ſold after Sheering, and before *Michaelmas*, this is good, and the Vendee ſhall be diſcharg'd. *Ibid.*

Tithes apportion'd.

By the Canon Law, where Sheep lodge in one Pariſh, and depaſture in another, the Tithes are to be divided. *Vide Degg* 258. But to me this ſeems unequal, for that the Land where they depaſture is made worſe by their Feeding, but the Land where they lodge is improv'd by their Compoſt, and conſequently the Parſon there ought in Reaſon to have a leſſer Share of the Tithes.

Herbage.

The Owner having paid Tithes of the Wool of Sheep, he ſhall not pay any Tithe for their Herbage, for then he ſhould pay Tithes twice of one Increaſe, 1 *Rol. Abr.* 642. & 1 *Rol. R.* 62. and therefore, if he buys Weathers, and afterwards ſhears, and then ſells them, no Tithes ſhall be paid of their Paſture, for that he ſhall pay Tithe of their Wool. *Per. Cur.* 1 *Rol. Abr.* 647.

Canon Law conſiſtent with common.

By the Canon Law, If ſeveral Mens Sheep depaſture together, yet this ſhall not make them to be tithed together, but every Owner ſhall pay his own Tithe. But if the Head of a Family has his Sheep mixed with his Childrens or Servants, or others under his Tuition, and he takes the Profit of 'em to his own Uſe, in ſuch Caſe they ſhall be tithed together. See *Degg* 257. and this Rule of the Canon Law ſeems reaſonable and conſiſtent with that of the Common Law.

But both guided by Cuſtom and Preſcription.

But as we have elſewhere obſerv'd, both the Canon and the Common Law, in the Caſe of Tithes, is to be guided by Cuſtom, and

and Preſcription, by Virtue whereof a *Modus decimandi*, or Cuſtom, or Preſcription of tithing has in many Places been introduced; a few Inſtances whereof, with reſpect to Tithe-Wool, we ſhall here inſert; reſerving a more particular Diſcourſe thereof to the Chapter of *Cuſtoms*, *Preſcriptions* and *Modus's of Tithing* hereafter. But note; ſuch Cuſtom, *&c.* muſt be founded on Reaſon, and at leaſt ſuppoſe a good and reaſonable Conſideration.

Preſcription to deliver a tenth Part ſine viſu, &c.

If a Preſcription be, that if the Owner hath under the Number of ten Fleeces of Wool, he ſhall pay a Penny to the Parſon for the Tithe of each of them; and if he hath more, that then he ſhall deliver to the Parſon the tenth Part of his Wool upon his Conſcience, without Fraud and *Covin*, *ſine viſu vel tactu* of the Parſon of the nine Parts; this is not a good *Modus*, for that it is unreaſonable, and is in Effect to give to the Parſon no more than the Pariſhioner pleaſed. See 1 *Roll. Abr.* 648. *Per Cur.*

To pay every Tenth Pound of Wool.

So if a Preſcription be, to pay every tenth Pound of Wool for the Tithes of the Wool, and it is not ſhewed what he is to pay, if the Wool doth not amount to ten Pounds, this is not good; for that is a Preſcription in *non Decimando*, if it be under ten Pounds (and the Tenth is due of common Right. (Q.) 1 *Rol. Abr.* 648.

Neither is it a good Preſcription that one hath paid the Tenth of the Wool of all Sheep that he had before *Lady-Day*, and ſheered or ſold, or put into another Pariſh, or the Value of the Tenth thereof at that Time,

Time, and this in full Satisfaction, as well of all Wool of ſuch Sheep, as of all other Sheep brought into the Pariſh after *Lady-Day*. For it is not reaſonable that the Tithes that one Man pays ſhall be a Diſcharge for all the other Pariſhioners. 1 *Roll. Abr.* 649.

Preſcription miſtaken.

But note; there was a Miſtake in the laying of this Preſcription; for it was intended to be a Diſcharge of all the Sheep of the Party himſelf only, which were brought into the Pariſh after *Lady-Day*, though not ſo expreſſed; and had it been ſo laid, the Preſcription would have been good, and ſo it was adjudged in another Caſe the ſame Term, *i. e. Mich.* 9 *Car.* 1. 1 *Roll. Abr.* 649.

Sheep ſold two Days before Sheering.

So if the Pariſhioner preſcribes, that in Conſideration he had Time out of Mind paid Tithe-Wool of all Sheep that he ſheered, *viz.* as well of thoſe which he bought but two Days before the Sheering, as of others that he had kept all the Year, he had uſed to be diſcharged of the Tithe-Wool of all Sheep that he ſold two Days before the Sheering: This is a good Preſcription, becauſe by the (Spiritual) Law, the whole Tithe-Wool of the Sheep nouriſhed in another Pariſh, and ſo lately bought before that Sheering, is not due to ſuch Parſon. Adjudged 1 *Roll. Abr.* 648.

But a Cuſtom to pay Tithes in Kind for Sheep, if they continue in the Pariſh all the Year; and if they be ſold before Sheering-time, but a Half-penny for every one ſo ſold, was held an unreaſonable Cuſtom; for

for by ſuch Means the Parſon may be defeated of his Tithes. See *March*, Caſe 128.

Bargain of Sheep. So a Prohibition being prayed, for that the Parſon libelled in the Eccleſiaſtical Court, for the tenth Part of a Bargain of Sheep which had depaſtured in the Pariſh from *Michaelmas* 'till *Lady-Day*, on a Suggeſtion that he was ready to pay the tenth Part of the Wool of them, according to the Cuſtom of the Pariſh; the Court refuſed to grant a Prohibition. For that by this Way the Parſon might be defrauded of all the Tithe. And, the Sheep being now gone into another Pariſh, he cannot have any Tithe-Wool at this Time, it not being the Seaſon of Sheering. See *Hob.* 197. 2 *Salk.* 656.

Locks of Wool. On Motion for a Prohibition for ſuing for Tithes of Locks of Wool, it was ſuggeſted, that he had (according to the Cuſtom of the Pariſh) paid the tenth Fleece of Wool, in Satisfaction of all Locks and Tithes due for Wool; and the Court held that the Subſtance of the Preſcription was good enough, becauſe Locks are not of the ſame Value with the Fleece; but in Regard there was a Fault in the Suggeſtion, (it not being ſaid that they had uſually paid, and which makes it iſſuable,) a Conſultation was awarded. See *Jeſſop* and *Paine*'s Caſe. 1 *Cro.* 3 *Cro.* 363. *Et vide ante.*

Cuſtoms iſſuable. And note; Uſe or Preſcription falls under the peculiar Cognizance of the Common Law, being a Matter iſſuable and properly triable by Jury; and it is in Order to try ſuch Cuſtom, *&c.* that the Court grants a Prohibition; ſo that if ſuch Cuſtom or Preſcription

ſcription be not certainly ſhewn, no Prohibition ſhall go, for that no certain Iſſue can ariſe, or be directed to be tried thereupon. *Vide Plus poſt*, in the Chapter of *Cuſtoms*, &c.

Barren Cattle depaſtured and ſold.

Not only the Tithes of ſuch Cattle, which yield a Tithe in Kind are to be paid; but alſo for the depaſturing ſuch as are barren Stock, as for Horſes, Oxen, Bullocks, *&c.* depaſtured to be ſold in the Pariſh, where they are depaſtured. See *Hetley* 100. 3 *Cro.* 475, *&c.* And ſee *Salkeld* 655. That the Tithes for Agiſtment of barren Cattle are due of common Right. *Cumb.* 403. 4 *Mod.* 336, and 340. *Hicks* and *Woodſon.* See the Caſe *poſt*, in the Chapter of *Cuſtoms*, &c.

Therefore, after a Man hath paid the tenth Colt, Calf, or Lamb, if he rears any of the reſt, and ſells them before they yield Profit to the Parſon, or be uſed for the Plough, he ſhall pay Tithe of them. *Moor* 909, and 3 *Cro.* 475. and *Hetl.* 85.

So of Milch Cows, if, after they are grown old or otherwiſe, they be kept dry and depaſtured as other dry Cattle, though but for one Month, a Tithe ſhall be paid for them. And ſo it is if they are fatted and ſold. *Hetl.* 100.

And if a Man doth buy Cattle, and feeds and ſells them, he ſhall pay a Tithe for them, for that they cannot render any other Tithe. But it is otherwiſe of Sheep, for there the Tithe is to be paid of the Wool.

No Tithes.

And if a Man buys or breeds Beaſts, and feeds them, and ſpends them in his Houſe, he ſhall not pay any Tithes for them.

Per

Per Cur. See 1 *Roll. Abr.* 647. *Moor* 909. *Goldsbo.* 174. 3 *Cro.* 446.

So if he, having paid Tithes of his Colts or Calves, doth rear any of the reſt, or buys others, to till his Land in the ſame Pariſh; or doth rear Cow Calves for to bear Calves, or for the Dairy, no Tithes ſhall be paid for the Paſture that they eat in the mean Time. *Hetley* 85. See 1 *Roll. Abr.* 846. 2 *Bulſtr.* 238. 1 *Roll. R.* 38. *Moor* 909. 3 *Cro.* 702. 2 *Brownl.* 30.

Oxen to till the Land. Nor ſhall Tithes be paid for the Paſture of Oxen uſed to till the Land in the ſame Pariſh, nor for the Paſture of Beaſts of the Pail at ſuch Time as they were milk'd, *&c. per Cur.* 1 *Roll. Abr.* 646.

Plough and Saddle Horſes. Alſo no Tithes ſhall be paid for the Paſture of Horſes, when employed in Ploughing or other Husbandry. 1 *Roll. Abr.* 646. Or if a Perſon keeps a Saddle Horſe for his Pleaſure, no Tithes ſhall be paid for his Graſs. See 1 *Bulſtr.* 171. *Hetl.* 94. 1 *Ventr.* 236.

But though Oxen, *&c.* have been uſed to the Plough, yet if they are afterwards fatted in Order for Sale, Tithes ſhall be paid *Agiſted.* for the Agiſtment of ſuch Oxen, or other Cattle, during the Time they were grazed and fatted, in order to be ſold, notwithſtanding they had been formerly uſed *Note.* to the Plough; for the Reaſon of their Diſcharge now ceaſes, they being become no Way beneficial to the Parſon in any other Tithes; adjudg'd in the Caſe of *Sandys* v. *Eaſtmond, in Scac.* See Parliament Caſes 192, *&c.* *& infra.*

For

For, the Advantage which the Parſon is ſuppos'd to have by the Labour, &c. of ſuch Cattle, by improving the Lands in the Pariſh, whereby his Tithes are to be increaſed, is the Reaſon of the Diſcharge of the Tithes of ſuch Cattle. Ratio.

And therefore, as I conceive, if one breed up Cattle for the Plough, &c. but hath not any arable Land within the ſame Pariſh, whereupon to employ thoſe Cattle, but employs them in another Pariſh, ſuch Cattle ſhall pay Tithes to the Parſon of the Pariſh where they are depaſtured. See *Hard.* 184. *Holdbeech* v. *Whadcock*, *in Scacc.*

And in like Manner it has been held, that if a Horſe be kept to carry Coals, &c. for Hire or other Gain, Tithes ſhall be paid for his Paſture. And if, when the Caſe is ſo, the Owner doth ſurmiſe, that he is kept for the Uſe of Husbandry, the other may alledge that he is kept to carry Coals, and the Allegation is traverſable. And ſo, if the Owner alledge that dry Cattle are kept for the Plough, this is traverſable; and the other may alledge that they are kept for Sale, without that that he keeps them for the Plough. See *Hetl.* 93, 94. *Traverſe.*

And note the Caſe of *Swales* v. *Lowther*, *Trin.* 7 *W.* 3. 5 *Mod.* 96, 97. *viz.* *A.* had a Houſe and a great Farm of Arable Land in the Pariſh of *Kippax*, where he dwelt; and alſo five Acres of ploughed Land, and forty Acres of Paſture in *Snillington*, upon which Paſture he fed his Cattle which were employed in Husbandry, in the Pariſh of *Kippax*. *Cattle agiſted in one Pariſh, and plowing in another.*

The

The Parſon of *Snillington* libelled for Tithes for the Agiſtment of the Cattle there; and thereupon the Defendant ſuggeſts, that by the Cuſtom of *England*, no Tithes ought to be paid for the Agiſtment of Cattle kept for Plough or Pail.

See Cro. El. 446, 475, 702. F. N. B. 53. G. 1 Rol. 645, 660. 2 Cro. 576. Moor 910.

And it was moved for a Prohibition, that the Plaintiff cannot libel for the Agiſtment of Cattle, but only for ſuch as are fed in the ſame Pariſh and not elſewhere, and that the Paſturage of Cattle uſed for Husbandry in the ſame Pariſh, is not tithable, becauſe the Parſon has Tithes for them in another Kind.

On the other Side it was ſaid, that the Parſon is to have a Profit wherever the Pariſhioner hath any Benefit; (a ſtrange Doctrine,) and that he is an Inhabitant where-ever he hath Land.

Curia. But the Court would not grant a Prohibition upon the firſt Motion, but gave the Defendant Leave to mend his Suggeſtion, by adding that he had Arable Land in *Snillington*, and did exerciſe Husbandry there: And it was ſo amended.

And afterwards in *Michaelmas* Term it was moved again, and the Court were then of Opinion, 'That if the Cattle depaſtured 'were not for ploughing the Land in the 'ſame Pariſh where they are fed, he ſhall 'pay Tithes though they plough in another 'Pariſh; and if he had more Cattle than 'he employed for the Plough in the ſame 'Pariſh, he ought to pay Tithes for them.'

But they ordered the Defendant to make Affidavit to aſcertain the Fact.

Upon a Suit for Tithes of dry Cattle, to have a Prohibition the Surmiſe was, that he uſed to pay the tenth Sheaf of Corn, the tenth Cock of Hay, the tenth Fleece of Wool, the ſeventh Calf, the Parſon to pay three half Pence, and the eighth Calf, if he had Eight, and the Parſon to pay a Penny, and ſo to Ten; and if he had under Seven, to pay only a Half-penny for every one; and after the ſame Rate for Lambs and Colts; and that this was in Satisfaction for the Tithes of dry Cattle, and for all other Tithes of Corn, Hay, and Cattle.

Tithes paid in Kind of Particulars, cannot be in Satisfaction of other Things.

And the Opinion of the whole Court was, that this Surmiſe is not ſufficient, for that which he uſed to pay is but the Tithes in Kind, and therefore cannot be in Satisfaction for the Tithes of other Things than themſelves. *Moor* 454, 909. 1 *Roll. Abr.* 651. But if it had been only for dry Cattle for Plough and Pail, it had been good. *Ibid.* and ſee 3 *Cro.* 446, 475. *Goldsbo.* 147. 1 *Roll. Abr.* 651.

Surmiſe inſufficient.

See alſo 2 *Salk.* 657. That Payment of Tithes of one Specie, cannot be a good *Modus* for all Tithes.

And *Ibid.* 656. That a *Modus* to pay a Part of the very Thing that is Tithe, is not good, unleſs it be payable in another Manner (whereby the Parſon has ſome Conſideration for the Reſidue of the Tithes not paid.)

Therefore to pay a whole Meal's Milk ſuch a Day, and ſo every ninth and tenth Night and Morning, 'till ſuch a Day, in

Tithe Milk. Vide ante, 79, 80, &c.

Lieu of all Tithe-Milk, is ill. See 2 *Salk.* 656, 657. *Goldsbo.* 147. *Vide poſt.*

So when a Surmiſe was of a Uſage to pay a Penny Yearly for every Milch Cow, and an Half-penny for every other Cow, and an Half-penny for every Mare, in Satisfaction for the Tithes of all Cows, Horſes, Steers, and other Cattle, it was adjudged inſufficient for the Reaſon aforeſaid. *Moor* 911, *&c. ſupra.*

Cheeſe in Diſcharge of Milk.

But if the Uſage hath been, that they who have Milch Kine in the Pariſh, have paid nine Cheeſes yearly at a Day certain, in Diſcharge of Tithe-Milk and fatting Cattle, this may ſerve for a good Surmiſe, becauſe the Cheeſes are made by Labour, and are thereby become Things of another Nature than the Milk was. 1 *Rol. Rep.* 62. 2 *Bulſtr.* 238.

Cattle fed on large Commons, &c.

And *Note*; for aſcertaining the Payment of Tithes of Cattle fed or depaſtured on large Waſtes and Commons, where the Limits and Bounds of Pariſhes are not well known, and which Waſtes and Commons may lie within ſeveral Pariſhes, it is enacted by the Statute 2 & 3 *Ed.* 6. *c.* 13. as follows.

Stat. 2 & 3 Ed. 6.

That all and every Perſon, which hath or ſhall have any Beaſts or other Cattle tithable, going, feeding or depaſturing in any Waſte or Common Ground whereof the Pariſh is not certainly known, ſhall pay their Tithes for the Increaſe of the ſaid Cattle ſo going in ſuch Waſte or Common to the Parſon, Vicar, Proprietors, Portionary, Owner, or other their Fermors, or Deputies

Deputies of the Pariſh, Hamlet, Town, or other Place, where the Owner of the ſaid Cattle inhabiteth or dwelleth.

But notwithſtanding this Statute, if by Preſcription, Time out of Mind, the Tithes of Cattle depaſtured and kept upon any ſuch Waſte or Common, where it is not known within what Pariſh the ſaid Waſte or Common lies, hath been paid to the Parſon of any Pariſh, *&c.* ſuch Cuſtom or Preſcription ſhall not be taken away, by the ſaid Clauſe of the *Stat. ſupra.* But the Tithes ſhall be paid to ſuch Parſon, *&c.* according to ſuch Preſcription. See *Savil* 60. *Cuſtoms continue.*

But a great Doubt has been, whether Cattle for the Plough, Pail, and Saddle, ſhould be accounted Tithe-free, without a Surmiſe of ſome Cuſtom for it? And *Richardſon*, in *Thornhill*'s Caſe in *Hetley*, held, that a Surmiſe (of a Cuſtom) ought to be made, and that he had ſearched the Books and the Book of Entries, and found that ever ſome Surmiſe is made. *Cattle for Plough and Pail diſcharged of common Right.*

But *Croke* replied, That in the King's Bench he had twenty Times ſeen Prohibitions granted in ſuch Caſes, without any ſuch Surmiſe; that is, to Suits in the Spiritual Court for Tithes for Saddle Horſes, and young Cattle kept for Plough and Pail. *Hetl.* 94.

And it is ſaid by the Lord Ch. Baron *Hale*, that of common Right, no Tithes are due for Cattle bred for the Plough and Pail, to be uſed in the ſame Pariſh. But if they belong to another Pariſh, Tithes are due for them; (*i. e.* for their Feeding) and

of that Opinion was the whole Court of Exchequer. *Paſ.* 13 *Car.* 2. *Hardr.* 184.

Young Cattle. But although ſuch Cattle as aforeſaid be Tithe-free, *&c.* of common Right, without any Cuſtom or Preſcription for it, yet on the other Hand, if the Parſon can preſcribe to have Tithes for young Cattle whilſt rearing for the Plough and Pail, as to have yearly one Penny, or the like, for each of them, this is good; but not without a Cuſtom for it. *Per Hutton* and *Yelverton* only preſent. *Hetley* 85.

Agiſtment of barren Cattle. And note; Tithes of Agiſtments and Herbage of barren Cattle are due of Common Right, and where Tithes are due of Common Right, a County or Hundred cannot preſcribe in a *non Decimando. Contra*, if Tithes are not due of common Right; for there a Country or Hundred may ſo preſcribe: See the Caſe of *Hicks* and *Woodſon.* 2 *Salk.* 655. 4 *Mod.* 336. *Cumberb.* 403. *Skinner* 560, 561.

Tithe thereof, when payable, The Tithe of barren Stock tithable is to be yielded (if no Cuſtom varies it) when they be fatted and ſold. For it is not Reaſon that the Parſon ſhould have the Profit of them, before the Owner himſelf has received it. *Hetley* 93.

and when apportioned. And if they are kept in divers Pariſhes, after they are bought, or during the Time of their breeding or rearing, the Tenth of the Gains if bought, or Value if reared, is to be to both the Parſons proportionably. *Popham* 197.

But note; on the Rearing it can be only the Tenth of the clear Gains; and *quære*

what that may amount to, or how to be computed. And ſee touching ſuch Apportionment of Tithes, *ante* Chap. 2.

Occupier or Inn Keeper agiſting Horſes of Travellers, &c.

The Occupier of Land is not only to pay for his own Stock depaſtured upon his Land, but alſo for the Stock of other Perſons thereon fed or maintained. 3 *Cro.* 475.

And therefore, if an Inn-keeper doth agiſt the Horſes of Travellers or Strangers on his Lands, he ſhall pay Tithes for them; for otherwiſe it is ſaid, the Owner of the Land would make a Profit of his Land, and yet defeat the Parſon of all the Tithe thereof. See *Hardr.* 35.

Horſes for Saddle,

Yet if any Man, having Lands in a Pariſh, ſhall rent out his Lands, reſerving the running of his Saddle-Horſe therein, no Tithes ſhall be paid for the Graſs he eats; by *Mountague*, *Croke*, and *Dodderidge*; contra *Houghton*, who held that for all barren Beaſts, Tithes ſhall be paid, except for ſuch as be for Husbandry (only.) 1 *Roll. Abr.* 641. *Laurkin* and *Wild*'s Caſe.

Hunting,

Quære of thoſe kept for Pleaſure only? as Hunting-Horſes, *&c.* For it ſeems no Tithes can be due for ſuch Beaſts, whereof no Profit is made by the Owner. *Vide infra.*

Sale, &c.

But if a Horſe be kept for Sale, it ſeems Tithes are to be paid for him, *i. e.* according to the Profits made on the Sale, Charges deducted, *&c. Vide ſupra.*

And to be excuſed from Payment of Tithes for ſuch Horſe, *&c.* it muſt be averr'd and prov'd, that the Horſe is uſed

for Labour; or kept for Pleaſure, as for Hunting, &c. *Popham* 126. 1 *Rol. Abr.* 647.

Saddle-Horſes, &c. In a Prohibition the Caſe was, *A.* the Defendant being Parſon of *D.* libell'd in the Spiritual Court againſt *B. inter al'* for the Herbage of depaſturing his Geldings; who there ſhew'd, that they were his Hackney Geldings, which he kept for his Pleaſure, and for himſelf and his Servants to ride upon, being his Saddle-Horſes; and this Plea being there refuſed, he therefore pray'd a Prohibition.

And the *whole Court were clear of Opinion*, That here was good Cauſe for a Prohibition, for that theſe Horſes are not tithable, neither is any Tithe-Herbage to be paid for them: But it would be otherwiſe if employ'd in Labour for Gain, or bought (or bred) for Sale; for of theſe he ought to anſwer to the Parſon for their Herbage, but not for the Herbage of his Geldings, by him kept and uſed only for his Pleaſure.

But had it been for working, or for Cattle bought and fatted to ſell again, there Allowance is to be made for their Herbage, becauſe a Profit does come in by them: But the Caſe is otherwiſe of Saddle-Horſes; and the whole Court agreed, that a Prohibition ſhould go. See 1 *Bulſt. Pothill* v. *Mary*.

By whom payable. It has been lately held *per Cur'*, that Tithes for Agiſtment of Cattle are payable by the Owner of the Cattle, for the Cattle take the Profit and Herbage of the Soil; and ſo it is in the Caſe of Commoners.

Nor

Nor can it be ſaid, that the Profits are taken by the Owner of the Soil; (*Qu.*) and yet the Lord Chief Baron *Hale* ſaid, that the Owner of the Soil might pay them; but clearly, the Agiſter is compellable to pay them. *Hard.* 184. and ſee *ibid.* 35. where 'tis ſaid to be held in *Face* and *Cauge*'s Caſe there cited, that Tithes for the Agiſtment of Cattle, ſhall be paid by the Occupier of the Lands. *Owner of the Cattle, or Occupier of the Land.*

To the Queſtion, How the Tithes for Agiſtments are to be paid? The Anſwer is, That if there be any Cuſtom in the Place, that muſt be obſerv'd to direct the Manner of the Payment: But if none, then the tenth Part of the Money to be receiv'd by the Agiſtment, is to be paid to the Parſon. *Popham* 197. *How to be paid; Cuſtom.*

And by *Hale* Ch. Baron, Tithes of Barren Cattle are *de Communi Jure* according to the yearly Value of the Land, after the Rate of 2 *s.* in the Pound *per Ann.* for that they cannot be otherwiſe valu'd or accounted for, becauſe the Profits of the Lands, for which they are paid, are perceived by the Mouths of Beaſts. *Hard.* 184. *Of Barren Cattle 2 s.* per *Pound.*

But by Cuſtom or Preſcription, the Tithes for ſuch Cattle (or Agiſtments) may be paid in another Manner, as by the Acre, or ſo much Money, *&c.* for all manner of Cattle Barren, and for the Plough and Pail. *Hard. ibid.*

So in an *Engliſh* Bill in the *Exchequer-Chamber*, againſt an Inn-keeper, who depaſtured Travellers Horſes, for which there was no cuſtomary Payment, and the Valu *Engliſh Bill.*

of the Land depaſtur'd was proved to be 30 *l. per Ann.* The Court was in Doubt what Decree to make for a certain Rate to the Parſon, it not being aſcertain'd by any Cuſtom. But they conceived, that they ought to have a Regard to the Value of the Land, and allow 2 *s.* in the Pound. And they agreed clearly, that Tithes are payable for ſuch Herbage eaten by the Mouths of Travellers Horſes. *Hard.* 35. See alſo the Caſe of *Buſh* and *Riſhley* in Chancery, *Mich.* 22 *Car.* 2. 1 *Chan. Caſes* 187, touching Rate-Tithes, *&c.* at the End of this Chapter, and Chap. 4.

No Tithes for Agiſtments in After-Graſs.

And whereas it is ſaid, that Tithes are to be paid of Agiſtments; yet this is not to be underſtood of Cattle agiſted in the After-Graſs of a Meadow, that has paid Tithe-Hay. 2 *H.* 4. *Rot. Parl.* 93. 1 *Rol. Abr.* 641.

Therefore, where an Inn-keeper has paid the Tithe-Hay of certain Lands, and for the Reſidue of the ſame Year depaſtures thereon the Horſes of his Gueſts (or others) no Tithes ſhall be paid for ſuch depaſturing; *per Cur'.* 1 *Rol. Abr.* 641.

Preſcription.

Alſo, if an Inn-keeper preſcribes, that in Conſideration he, and all others, whoſe Eſtate he hath, *&c.* have paid Tithes of Hay and Grain growing upon the Land appertaining to his Inn, and hath paid Tithes of all his own Beaſts depaſtur'd on the ſame Lands, that they have been Time out of Mind diſcharg'd of the Tithes of the Horſes of their Gueſts agiſted in the ſaid Lands.

This

This was held to be a good Preſcription: For by ſome 'twas held to be only a Perſonal Tithe; and by others, that no Tithes are due by the Common Law for ſuch Agiſtment, without a Cuſtom to ſupport it. 1 *Rol. Abr.* 641. *Perſonal Tithe.*

But Mr. *Watſon* thinks this Caſe not Law, and that the Reaſons here aſſign'd are not true, *viz.* That it is only a Perſonal Tithe, or, that no Tithes thereof are due *de Jure*, without a Cuſtom. *Ergo Quære.*

And it muſt be confeſs'd, that in the Caſe *ſupra*, no more is alledged to be paid than ought to be paid of common Right; and that thoſe Payments cannot diſcharge ſuch Lands as yielded not to the Parſon either Tithe-Corn or Tithe-Hay. For Tithes paid of particular Things in Kind, cannot be in Satisfaction of other Things. *Vide ante.*

And when, upon a Suit for Tithes of Agiſtments, the Defendant in the Spiritual Court pleaded, that he had always paid 12 Pence by the Year for every Milch Cow going on ſuch a Paſture, and that for this Payment he had been diſcharged of the Payment of Tithes for all Agiſtments in that Land; 'twas held by *Popham*, that this Payment of Money for Milch Beaſts ſhall not diſcharge from the Payment of Tithes for other Beaſts. *Goldsb.* 147. *vide ante.* *Payment for Milch Beaſts, no Diſcharge for other Beaſts.*

But if he had preſcribed, that he had paid one Penny for all Cows and Beaſts agiſted, that, peradventure, had been good; *per Cur'*, *ibid.* and ſee 3 *Cro.* 446, 475. 1 *Rol. Abr.* 651. *Moor* 911. 2 *Salk.* 656, 657.

See

Milch Cows, Bees, and Orchards. See alſo the Caſe of *Smithſon* v. *Dodſon*, *Mich.* 11 *Geo.* 1. in Chancery, (*New Caſes in Equity* 117.) where a Cuſtom is preſcribed to pay three Half-pence *per Ann.* for every Milch Cow, one Penny for every Swarm of Bees, and 6 *d.* for every Orchard within the Pariſh, in lieu of all Tithes there, for ſuch Milch Cows, Bees, and Orchards; and this ſeems to be allow'd as good. *Vide poſtea*, towards the End of the following Chapter.

Hogs. *Quære* if any Tithe be due for Hogs, except of the Perſonal Profits of their Bacon, when ſold, or of their Young, *i. e.* Tithe Pigs.

Pigs. Of young Pigs, (as of Calves *ante*,) If there be but nine, or any Number under Ten, in one Year, the Parſon can have no Tithe thereof in Kind for that Year, without a ſpecial Cuſtom for it. But in ſuch a Caſe, he muſt either take his Tithe *pro Rata*, in Money the ſame Year, if there be a Cuſtom to take it ſo; or elſe he muſt tarry till the next Year, and ſo reckoning both Years together, take this Tithe in Kind, as was held, *per Cur'*, *Mich.* 7 *Jac. C. B.* See *Rep. Can.* 430.

No Tithes of Creatures Feræ Naturæ, *without a Cuſtom.* But we muſt obſerve, that, beſides thoſe Domeſtick Beaſts before ſpoken of, there are other Beaſts fed upon Lands which may take the Paſture thereof, and be a Profit to the Owner of the Soil, as Deer, Hares, Conies, and the like.

Deer. And as to Deer, 'tis expreſly adjudg'd, that no Tithes are due for them, becauſe they are *Feræ Naturæ*. *Hetley* 147. And the

the ſame Reaſon holds in the Caſe of Hares. *Sed Quære* the Cuſtom of *Everly* Warren in *Wiltſhire*, wherein Hares are kept as 'tis ſaid for Profit; and if Tithes are not paid thereof by Cuſtom? *Hares.*

And as to Conies, it is held that theſe being alſo *Feræ Naturæ*, no Tithes can *de Jure* be due for them. But there may be Tithes paid of them by Cuſtom. See for this, 1 *Roll. Abr.* 635, ſeveral Caſes. See alſo *Hetley* 147. *Bendl.* 144. *Hardres* 188. 1 *Keb.* 602. *Conies.*

But altho' the Law be clearly ſo, yet we find it to be vehemently complain'd of, as very hard upon the Parſon; for that ſuch Beaſts take away the whole Profits of great Parcels of Land, and yield an anſwerable Benefit to the Owner; and that ſometimes Arable Lands are turn'd into Conygrees and Parks, which is not only grievouſly hurtful to the Parſons in whoſe Pariſhes they lie, but alſo to the Common-wealth, and therefore deſerves no Favour. *Objection.* Watſon 563.

But methinks an eaſy and modeſt Anſwer may be given to this Complaint, beſides what may be urged from the Reaſonableneſs both of the Common Law, and of Cuſtom, in this Particular, *viz.* *Anſwer.*

Firſt, That the Lands uſually ſo employ'd are generally waſte and barren, or elſe the Lord's Demeſnes, and encloſed for the Preſervation of the Game; which were either for the Suſtenance of his Family, or elſe for his Pleaſure and Delight; in both which Caſes, no Tithes *de Jure* are due, or ought to be paid.

And

And *Secondly*, Tho' Arable Lands have, in ſome few Inſtances, been of late turn'd into Parks, *&c.* yet there is always ſome Proportion of Tithes, equal to what was formerly paid, reſerved to the Parſon by the King's Grant. And conſidering on the other Side, the vaſt Quantity of Parks, Waſtes, Common, *&c.* of late turn'd into Arable, and Tithes thereof paid in Kind, it is conceived, that the Clergy of *England* have little Ground for the above Complaint.

Of Fowls domeſtick, as Geeſe, Hens, Ducks, &c.

And as of Beaſts of Profit, ſo of Fowls, (*i. e.* ſuch as are Domeſtick, and not *Feræ Naturæ*) Tithes are to be paid, as Geeſe, Hens, Ducks; and ſome think Turkies ought to be added.

Of Turkies.

But I find it affirmed *per Curiam*, in *Houghton* and *Prince*'s Caſe, *Moor* 599. That Turkies are to be rank'd amongſt Things that are *Feræ Naturæ*, and for that Reaſon, both they and their Eggs are there affirmed to be Tithe-free.

How tithed, by Eggs, or Young.

Now, the Manner of tithing theſe Fowls is either by paying the Tenth Egg, or the Tenth of their Young; and where the Tithe of the Eggs which come of any Fowl is paid, no Tithe of the Young is to be paid; and *econtra*, where the Tithe of the Young is paid, no Tithe of the Eggs is due. So reſolved, 1 *Roll. Abr.* 642.

Modus.

'Tis alſo ſaid to be a good *Modus* for Tithe of Eggs, to pay 30 Eggs in Lent for all Tithes of Eggs. 1 *Roll. Abr.* 648.

Geeſe and Feathers.

And when a Prohibition was pray'd to a Suit for the Feathers of old Geeſe ſheer'd, and

and alſo of the Young, ſuggeſting a *Modus* of a young Gooſe with the Feathers, paid on the firſt Day of *Auguſt* yearly, in full of the Tithes of Geeſe and Feathers; it was granted accordingly; for that it was more than the Pariſhioner was otherwiſe bound to do, to keep a Gooſe feather'd 'till the Firſt of *Auguſt*. 3 *Keb.* 705.

Fowls Feræ Naturæ, *not Tithable.*

But no Tithes are to be paid of Pheaſants, Partridges, or the like; whether they go at large, or be taken, clipped, and kept in a Place inclos'd, becauſe they are *feræ Naturæ*, and ſtill remain ſo, tho' under Reſtraint. 1 *Roll. Abr.* 636.

As, Pheaſants, Partridges, &c.

'Tis alſo ſaid, that if Pheaſants, or Partridges, are made tame, *&c.* yet no Tithes ſhall be paid for them, upon the ſame Reaſon that they are *Feræ Naturæ*. *Moor* 599.

And if they lay Eggs, and breed their Young, no Tithes ſhall be paid of ſuch Eggs or Young.

Nor Pidgeons.

Alſo Pidgeons ſeem to be *Feræ Naturæ*, (tho' it is made Felony by Statute, to take them out of a Dove-Cote) and therefore no Tithes ſhall be paid of them, eſpecially if they be ſpent in the Owner's Houſe, or Family. For then they are for the Maintenance and Support of thoſe who labour in other Things whereof the Parſon hath the Tithes. See 1 *Roll. Abr.* 644. *Hetley* 27, and 147.

So if a Man doth maintain a Family, and hath Pidgeon-Holes about his Houſe, where young Pidgeons are bred, no Tithes ſhall be paid of thoſe that are ſpent in his Houſe, *&c.* 1 *Roll. Abr.* 644.

And

And yet 'tis there ſaid, that by Cuſtom Tithes ſhall be paid of Pidgeons ſpent in a Houſe, tho' no Tithes are due for 'em of Common Right. And it ſeems to be adjudg'd in one *Stoutfield*'s Caſe. *Paſ.* 28 *Car.* 2. *B. C.* That no Tithes are to be paid for Pidgeons, unleſs it be by Special Cuſtom. See 2 *Mod. Rep.* 77.

Perſonal Tithes. But tho' Pidgeons may in ſome Reſpects be ſaid to be a Kind of Mixt Tithes, yet in others they are rather to be eſteem'd Perſonal, becauſe of the Perſonal Labour and Care that attends 'em.

And 'tis certain, that Pheaſants, Partridges, and all other Creatures that are *Feræ Naturæ*, and acquir'd only by Art, and Labour, are merely Perſonal, and ſo are their Young.

Eggs Alſo the Eggs of all Fowls, whether Domeſtick, or *Feræ Naturæ*, ſeem to be a Perſonal Tithe; and the like of Bees and their Swarms; and of Fiſh, taken either in the Sea, River, Pond, *&c.*

Bees.

Fiſh.

Fowl. *Note*, That of Fowl taken by a Faulkner, or Gentleman who hawks for his Pleaſure, no Tithes ſhall be paid. But if a Fowler kill Fowl, and make a Profit of them, it hath been held, that he ſhall pay a Perſonal Tithe for them; and *Paſ.* 15 *Car.* 1. it was adjudg'd accordingly. See *Rep. Canon.* 408.

But concerning the Tithes of Fiſh, and of the ſeveral Kinds of Beaſts and Fowl, for which, only Perſonal Tithes are due, ſee the following Chapter.

CHAP. IV.

Of Perſonal Tithes, their Definition, Nature, and Kinds, as of Tradeſmen, Servants, &c. Of Mills at large proved to be Perſonal. Of Fiſhing, Fowling, and Hunting. Of Creatures feræ Naturæ, *as Bees, Conies, Deer, Doves, Geeſe, Pheaſants, Turkies, with their Products,* viz. *Honey, Wax, Eggs, Young,* &c. *As alſo of Oblations, Obventions, Offerings, Tithes of Marriage Goods in* Wales, *and Mortuaries.*

Perſonal Tithes.

IN the foregoing Chapters we have ſomewhat largely diſcourſed of Tithes in General, and alſo of Predial and Mixt Tithes in particular; and therefore (in Purſuance of a Natural Order) are now to proceed to treat of ſuch Tithes as are called *Perſonal*; and which, according to the Canoniſts, are ſo called, *quia potius in reſpectu Perſonæ ſolvuntur quam Rei.* Vide Deg. 338, 339.

Theſe

Defined, &c. Theſe, as is ſaid before, are the tenth Part of the clear Profits, which ariſe by the honeſt Labour, Art, or Induſtry of Man, imploying himſelf in ſome lawful Work, Artifice, or Negotiation; as by following any Trade or Occupation, as Carpenter, Smith, Maſon, Butcher; or by Buying and Selling, as Merchant, Retailer, Grocer, Druggiſt; and the like of Fiſhing, Fowling, Hunting, *&c.* if ſuch Imployments are uſed for Gain, and not for Pleaſure only. See 2 *Inſt.* 621, 657, 649. 1 *Roll. Abr.* 656.

Canon Law and Cuſtom. Stat. 9 E. 2. 27 H. 8. *and* 32 H. 8. And by the Canon Law, every one who uſes Buying and Selling, *&c.* ought to pay for a perſonal Tithe, a Tenth Part of all his clear Gains, deducting his Charges and Expences. And it ſeems that, at the Time of making the *Stat. Artic. cleri* (9 *E.* 2.) this was the general Cuſtom. *Vide* that Statute, and the Stat. 27 *H.* 8. *c.* 20. and 32 *H.* 8. *Cap.* 7. *Sect.* 1. But it ſeems this is now paid only in Offerings and Oblations.

But the Law then was, and ſtill is, that if a Man buy Goods, Wares or Merchandizes, and do not ſell them to Profit, or if he gives them, or makes uſe of them for himſelf or Family, there no Tithe is to be paid, becauſe no Gain is made of them.

Stat. 2 & 3 E. 6. After this came the Stat. 2 *&* 3 *Ed.* 6. *cap.* 13. which confirming the ſaid Acts of 27 *H.* 8. and 32 *H.* 8. does more certainly direct the Payment of perſonal and other Tithes, *&c. viz.*

That

That every Perſon exerciſing Merchandize, Bargaining, and Selling, Cloathing, Handicraft, or other Art or Faculty, being ſuch kind of Perſons and in ſuch Places as heretofore within theſe forty Years have been accuſtomably uſed to pay ſuch perſonal Tithes, or of Right ought to pay (other than ſuch as have been commonly Day-Labourers) ſhall yearly at or before the Feaſt of Eaſter *pay for his perſonal Tithes, the Tenth Part of his Clear Gains; his Charges and Expences according to his Eſtate, Condition, or Degree, to be therein abated, allowed and deducted.*

Provided, That in all ſuch Places, where Handicraftſmen have uſed to pay their Tithes within theſe forty Years, the ſame Cuſtom of Payment of Tithes is to be obſerved, and to continue, any Thing in this Act to the contrary notwithſtanding. *Cuſtom of forty Years.*

And alſo Provided, that on Neglect or Refuſal to pay, it ſhall be lawful for the Ordinary of the ſame Dioceſs, to call the ſame Party before him, and by his Diſcretion to examine him by all lawful and reaſonable Means, other than by the Party's own corporal Oath, concerning the true Payment of the ſaid Tithes.

The learned Sir *Simon Degg* has obſerved, that this Act of Parliament reſtrained the Canon Law in two Things, *viz.* Firſt, That whereas the Canon was general, that all Perſons in all Places ſhould pay their perſonal Tithes, this Act reſtrains it to ſuch Perſons only, as had accuſtomably uſed to pay the ſame within forty Years before the making of the Act. And, *Vide Degg, p. 340. Canon Law reſtrained.*

Secondly, Whereas by the Eccleſiaſtical Laws they might, before the making of this Act, have examined the Party upon his Oath concerning his Gain, this Act put a Reſtraint on that Practice, ſo that the Party was not (by them) to be examined on Oath concerning his Gain, *&c.*

It might alſo be further obſerved, that this Act reſtrains the Clergy from exacting perſonal Tithes from common Day-Labourers, a Practice too frequent both before and at the Time of making the ſaid Act, many Day-Labourers and poor Servants being ſued for ſuch Tithes in the Spiritual Courts, by Reaſon of the general Words of the Canon before-mentioned.

Its Practice herein cenſured.

And indeed the Diſputes and Difficulties that frequently aroſe in the Proſecution of thoſe Suits, induced even a Canoniſt to declare, *Hæ Decimæ perſonales magis difficultate & ſubtilitate, quam utilitate exiſtunt. Vide* Degg *ibid.*

Not payable by Day-Labourers, nor Servants of the Plough, and in Husbandry.

But now, by the expreſs Words of the above Statute, no Perſonal Tithes are due from common Day-Labourers.

And it has been alſo adjudged, that Servants of the Plough ſhall not pay any Tithes of their Wages; and a Prohibition was granted accordingly, although the Libel was only for a third Part of their Wages, leaving the Reſidue to be free. For as it is there ſaid, by the ſame Reaſon that Beaſts of the Plough ſhall be free from Tithes, the Servants that attend the Plough ſhall be alſo free. (And the like Reaſon holds

holds for all Servants in Husbandry.) See 1 *Roll. Abr.* 646.

Neither ſhall Tithes be paid of an Inn-keeper's Gains, *viz.* *Nor of an Inn-keeper's Gains, &c.*

A Parſon libelled in the Spiritual Court againſt an Inn-keeper to have the Tithes of the Profits by him made of his Kitchin, Stable and Cellar; and laid particularly, that he made great Gain in ſelling of his Beer, having bought it for 500*l.* and ſold the ſame for 1000*l.* and that *Negotiando & traficando* he had gained 300*l.* of which he ought to have Tithe. But upon Motion a Prohibition was granted. (*For*, as it ſeems, *an Inn-keeper's Gains do not ariſe from ſuch a Merchandizing, or Buying and Selling, as is intended by the Statute* 2 & 3 Ed. 6. *Beſides the Statute extends only to ſuch Perſons and ſuch Places as had been accuſtomed to pay ſuch Tithes for forty Years before.*) See 2 *Bulſtrode* 141. *Expoſition of the Act.*

Nor can it be intended upon that Statute, that although ſuch perſonal Tithes have been ſometimes paid within forty Years paſt, that therefore they are due by Virtue thereof; but as the Act it ſelf ſays, that muſt have been accuſtomably, that is, conſtantly paid for forty Years next before the Act made. See *Degg* 340.

And if it be demanded how ſuch accuſtomable Payment muſt, or can now be proved, forty Years before the making of that Act: The Anſwer is as in all other like Caſes, *a Praxi poſteriore*, by what has been conſtantly done all the Time of Memory, ſince the ſaid Act. *Vide ibid.* *Cuſtom before the Act, proved à parte poſt.*

Perſonal Tithes not of common Right.

It is before obſerved, *pag.* 10. That no Perſonal Tithe is due of common Right, and therefore muſt entirely depend upon Cuſtom, or particular Statutes, as that of *Ed.* 6. *ſupra*, and other ſubſequent Statutes, as 7 & 8 *W.* 3. *c.* 6. and 1 *Geo.* 1. *c.* 6. which ſee hereafter.

Quære of Mills.

It is likewiſe remarked, *pag.* 19. That it is queſtioned in our Books, whether any Tithes are due for Mills, or not, &c. *Vide ibid.*

Now to clear that Doubt, if poſſible, let us conſider the following Caſes and Arguments, with Reſpect to Mills, *viz.* Corn-Mills, Fulling-Mills, Paper-Mills, &c.

Corn-Mills, &c.

My Lord *Coke* in his 2 *Inſt.* 622. ſays, that it was never judicially determined, that he knew of, whether any Tithes were due for Corn-Mills; but for Fulling-Mills, it has been held, that none are due; and *ibid.* 621. it is ſaid the Tithes of ſome Mills at leaſt, as Fulling-Mills, Paper-Mills, &c. are perſonal.

It was alſo ſaid by him, when Chief Juſtice, and in the Seat of Judgment, that no perſonal Tithes by the *Stat. Ed.* 6. were to be paid for Mills, but only where by ſpecial Uſage the ſame had been (accuſtomably) paid; to which the Court agreed. See 3 *Bulſtr.* 212. and 1 *Roll. R.* 405. S. C.

Fulling-Mills, &c.

So when a Suit was in the Spiritual Court for the Tithes of a Fulling-Mill, ſuggeſting that the Defendant did Full with his Mill forty Cloths weekly, and did gain by each Cloth 2 *s.* whereof he demanded Tithes; a Prohibition was granted upon this Surmiſe only,

only, that by the Law of the Land, he ought not to demand Tithes of ſuch Mills. For, *per Curiam*, Tithes are not payable of ſuch Things whereof the Gain comes by the Labour of Men, without a Cuſtom. See 2 *Cro.* 523.

This Caſe was ſo adjudged, *Hill.* 16 *Jac.* 1. *B. R.* and the Reſolution ſeems to be founded on the expreſs Words of the ſaid Statute, *i. e. accuſtomably uſed to pay.* And yet in *Mich.* 11 *Car.* 1. in the ſame Court, it was reſolved in another Caſe, that Tithes by the Law are due of ſuch Mills; and a Prohibition was denied. 1 *Roll. Abr.* 641. *Perſonal.*

But note; this was under Archbiſhop *Laud*'s Adminiſtration. ——

It ſeems to be admitted, that of all other Mills beſides Corn-Mills, (as Fulling-Mills, Paper-Mills, Powder-Mills, Iron-Mills, Copper-Mills, *&c.*) if any Tithes are due for them, they are meerly Perſonal; and the Reaſon is apparent, for that ſuch Tithes muſt ariſe from the Perſonal Labour, Art, or Induſtry of the Perſons imploy'd therein. *Ratio.*

But, as ſome have ſaid, the Tithes of Corn-Mills, whether driven by Wind, Water, Horſe, or Hand, are not Perſonal, but rather Predial or Mixt, and therefore that according to the Cuſtom of the Realm, the Miller ought to pay the Tenth Toll-Diſh for Tithes. 1 *Roll. Abr.* 656. *Corn-Mills ſaid to be Predial or Mixt.* Sed quære.

And this Opinion has been ſince favoured by the Authority of a very great Man in his Profeſſion, *viz.* the Lord Chief Juſtice *Holt*, who in the Caſe of *Gumley* and *Falkingham*,

Mich. 3 *W. & M. B. R.* argued it to be a Predial Tithe; for that it was payable to the Proprietor of the Tithes (or Parſon of the Pariſh) where the Mill is, and not where the Miller lives.

And to prove their being ſo payable was cited, *Lindwood*, Tit. *de Decimis C. quanquam verb. ſicut fœni.* That Predial Tithes were payable where they ariſe, but Perſonal Tithes where the Perſons *audiunt divina & recipiunt ſacramenta.*

But ſetting aſide the *ipſe dixit* of *Lindwood* (which I conceive to be no Authority in this Caſe) I think an eaſy Anſwer may be given to the Authority and Argument of 1 *Roll. Abr.* and the late Lord Chief Juſtice *Holt.*

But the Author conceives them to be Perſonal.

As to the Authority of the former, we have a greater to the contrary, *viz.* that of the Lord Chief Juſtice *Coke*, who in his 2 *Inſt.* 621, and 652. and in divers other Parts of his Works, has declared the Tithe of Corn-Mills to be Perſonal.

And as to the Argument of the latter, it may be proper to conſider, whether the Tithe of Corn-Mills doth ariſe from the Corn ground, or from the Miller's Labour, or from the Toll taken.

The Reaſons thereof.

Now it is admitted, it would be a Predial Tithe, if it aroſe from the Corn ground: But that having paid Tithe before, when it ſtood on the *Prædium* or Land from whence it ſprung, it thereby diſcharged all the Duties of a Predial Tithe, and conſequently can never be charged again as ſuch. And as to any other Tithe due by Reaſon there-

of, the Rule is *Decimæ de decimatis ſolvi non Debent*; and it is Repugnant to Law and Reaſon, that the ſame predial Thing ſhould pay Tithes twice, which can renew or grow but only once.

The Toll a Reward for the Miller's Labour, &c.

And if ſuch Tithes are claimed, either by Reaſon of the Miller's Labour, or the Toll taken, it is evident it muſt be as a Perſonal Tithe. The Miller's Labour is admitted to be Perſonal, and what is the Toll but a Reward for that Labour? Which Reward, whether paid in Money or Corn, is ſtill the ſame; it is a Perſonal Reward for a Perſonal Service; and conſequently the Tithe thereof being the Tenth of the Miller's Gains, can be eſteemed only as a Tithe meerly Perſonal, and no Way Predial.

And as to *Lindwood*'s Rule, it is certain it was none at Common Law; for it is agreed, that before the Second Council of *Lateran*, *Anno* 1120. People might have paid their Tithes, eſpecially their Perſonal Tithes, to what Church or Miniſter they pleaſed. And the Reaſon of fixing the Tithe of the Toll to the Mill, was for that the Profit there aroſe, and there the Parſon might beſt demand his Tithes.

Though payable at the Mill, yet not Predial.

But the fixing the Tithe to the Mill, does not therefore make it Predial; for the Mill it ſelf is no otherwiſe Predial than any other Houſe, which is only ſo by Reaſon of the Land on which it ſtands, but the Tithe here is not by Reaſon of the Land on which the Mill ſtands, nor by Reaſon of the Mill itſelf, but by Reaſon of the Gain or Profit made by the Miller. *Ergo Perſonal.*

Nor does the fixing of any Perſonal Office, Duty or Payment to any certain Place, whether Pariſh, Field or Houſe, make the Duty or Payment either Parochial, Predial or Real. The Office, Imployment, Duty or Payment, ſtill remains Perſonal, and muſt be accordingly ſued for and demanded. *Vide infra.*

Adjudg'd not meerly ſo.

Beſides it has been adjudged, that Tithes of a Corn-Mill are not merely Predial, as in *Goodwin* and *Smith*'s Caſe. 1 *Roll. Abr.* 652. where for two Meſſuages, and two antient Water-Mills to grind Corn, the Owner had uſed Time out of Mind to pay the Parſon 20 *s.* yearly, in Lieu of all Tithes iſſuing out of the ſaid Meſſuages and Mills; and afterwards the Owner erected two new Corn-Mills within the ſaid Meſſuages; and *per Curiam*, This *Modus* ſhall not diſcharge theſe new Mills from the Payment of Tithes, for that the Tithe of a Mill is not merely Predial, but mixed with the Perſonalty, and has more of the Perſonalty than of the Predialty. See *Goodwin* and *Smith*'s Caſe. 1 *Roll. Abr.* 652.

No Tithes of a Wind-Mill, &c.

Yet it is ſaid to be held by the Court, that if a Man doth preſcribe to pay to the Parſon a certain Thing, as a *Modus decimandi* for all the Demeſnes of his Manor, and he afterwards doth erect a Wind-Mill upon Parcel of the Demeſnes, he ſhall not pay any Tithes for this Mill; but the *Modus* given for the Demeſnes ſhall go in Diſcharge of it alſo, it being built upon the Land diſcharged. 1 *Roll. Abr.* 651.

So if a Man ſeized of Eight Acres of Meadow and Paſture, for the Tithes of which he

he had uſed to pay, Time out of Mind, five Shillings and ſix Pence, and afterwards he erects upon it a Corn-Mill, he ſhall pay no Tithes for the Corn-Mill, becauſe the Land was diſcharged by the *Modus Decimandi*. See 1 *Roll. Abr.* 652. 2 *Inſt.* 492.

Alſo where the Parſon libelled for the Tithe of a Mill, erected upon Land diſcharged of the Tithes by the Statute of Monaſteries, 31 *H.* 8. a Prohibition was denied by the whole Court. For this was a new Mill, and the Rule is, *de Molendino de novo erecto non jacet Prohibitio. Artic. Cleri, Cap.* 5. 1 *Roll. Abr.* 641, 652. See *Cro. Jac.* 429.

Now though the before-cited Caſes ſeem to differ in ſome Circumſtances, yet to me the Reaſon of judging therein appears the ſame in all of them, *viz.* that the Profit of his Mill is a different Thing from the Profit or Produce of the Land; and therefore the Tithe due for it is either Perſonal, or none at all.

Hence it appears, that the Caſes of *Good-win* and *Smith*, cited *ſupra*, and the anonymous Caſe in 2 *Cro.* 429. cited *infra*, and the Authority of 2 *Inſt.* 621, and 652. are more agreeable to Reaſon than the Opinion of *Holt*, Ch. Juſt. in the Caſe of *Gumley* and *Falkingham*, *ſupra*. Modus.

And we may further obſerve, that every *Modus* is ſuppoſed to ariſe from an original Agreement upon giving a Recompence for the Tithes, which Agreement cannot be preſumed to be made for other than for a Perſonal Duty to ariſe *in futuro*, (there being no other Thing then in Being) and not for

for Predial Tithes, which are of a different Nature, and not to be aſcertained.

Therefore if a Man has a Meadow, on which he has alſo a Mill, and he agrees with the Parſon for the Tithes of the Profits, ariſing from the Land only; it will be hard to ſay that this Agreement ſhall be extended to free the Mill alſo, although it was then in Being. For the Profit of the Mill is another Thing, and quite different from the Profit of the Land.

Meerly Perſonal.

Alſo the Lord *Coke*, 2 *Inſt.* 621. ſeems clearly of Opinion, that the Tithe of a Corn-Mill is but a meer Perſonal Tithe. And that the Tithe thereof is paid with Reſpect to the Owner's or Miller's Perſon, as conſidered together with his Employment, and not with Regard to the Land (or the Corn ground) as is before obſerved.

And ſurely none will affirm, that a Man, who by his Employment and Cuſtom of the Place is to pay a Perſonal Tithe, if he purchaſe Land which is Tithe-free, or for which a *Modus* is paid, is therefore free from paying a Perſonal Tithe: No, not though he erects his Habitation upon ſuch Land. Then why ſhould he be diſcharged therefrom, if he erects only the *Engine of his Art* there? (For ſo Mills are ſaid to be.) And conſequently, though the Land be diſcharged, yet the Tithe of the Mill remains.

Mill an Engine.

How diſcharged by Modus.

However, a Corn-Mill may be diſcharged of paying the Tenth of the Toll by paying a *Modus* for it; and if the Owner in ſuch Caſe be ſued for the Tenth, a Prohibition lies. 1 *Roll. Rep.* 405.

But

But if the Surmiſe be of a Cuſtom to pay a certain Rate for all Mills erected, and to be erected, ſuch Cuſtom ſhall not go to any new Mill; and therefore in ſuch a Caſe, by Rule of Court, Though as to the antient Mills, the *Modus* was allowed to be good, yet as to new Mills a Conſultation was awarded. See 3 *Bulſtr.* 312. *Jakes*'s Caſe. *Good for antient, not for new Mills.*

And note; as to new Mills it has been enacted, (it ſeems upon a Complaint and Petition of the Clergy only) 'That if any 'do erect in his Ground, a Mill of new, 'and after, the Parſon of the Place de-'manded Tithes for the ſame, the King's 'Prohibition doth iſſue in this Form: *Quia 'de tali Molendino hactenus Decimæ non fue-'runt Solutæ, Prohibemus, &c. Et Sententiam 'Excommunicationis, ſi quam hac occaſione pro-'mulgaveritis, revocetis omnino*'. *Stat.* 9 Ed. 2. *cap.* 5. *Of new Mills.*

The Anſwer (according to the then Mode of Acts of Parliament) is, 'In ſuch Caſe 'the King's Prohibition was never granted 'by the King's Aſſent, nor ever ſhall, who 'hath decreed, that it ſhall not hereafter 'lye in ſuch Caſes, Stat. 9 *E.* 2. (commonly 'called *Articuli Cleri.*) cap. 5. (which ſeems 'made to flatter the Clergy when the King 'aimed at Arbitrary Power.)'

By this Statute it appears, That all Corn-Mills not erected before the Time of *Ed.* 2. are tithable in themſelves. But becauſe many Mills ſince erected, may be to us ancient, and their firſt Erection unknown, the Rule of their Diſcharge I conceive muſt be, that all ſuch Mills whoſe firſt Erection was before Time of Memory, and is not otherwiſe known

known by Matter of Record, *&c.* not having been ſubject to the Payment of Tithes, ſhall be intended to be erected before the Statute, and ſo to be Tithe-free. But as to Mills for which Tithes have been paid, and new Mills, Tithes muſt be paid for them, as is aforeſaid by *Coke* in *Jake's* Caſe. 1 *Roll. R.* 405.

Tithe-free.

Prohibition thereon, how obtain'd.

Therefore, when Prohibitions are moved for, to ſtay Suits for Tithes in the Eccleſiaſtical Courts for ancient Mills, it muſt not only be ſuggeſted, that the Mill is an ancient Mill, but alſo that it hath never paid Tithes; and the Courts of Common Law do generally require an Affidavit to be made of the Truth of ſuch Suggeſtion, *viz.* That the Mill is ancient, and hath not within Memory paid any Tithes.

Alſo, if a new Mill be erected upon Lands diſcharged of Tithes by the Statute of Monaſteries, 31 *H.* 8. *c.* 13. Tithes ſhall be paid thereof; by the whole Court, and a Prohibition lies not, For that the Rule is, *De Molendino de novo Erecto non jacet Prohibitio.* Trin. 15 Jac. 1. B. R. 2 Cro. 429.

A Baker erects a Mill.

If there be a Cuſtom in two Hundreds, (though in ſeveral Counties) That if any common Baker of Bread, inhabiting in either of thoſe Hundreds, doth erect any Watermill, Windmill, or Handmill, within either Hundred, to grind his Corn to be employ'd for the making Bread for himſelf in his Trade of a common Baker, for the Maintenance of his Family, and to ſell to his Cuſtomers inhabiting within or near the ſaid Hundreds, for their Suſtentation, by which the

the Parſons in the ſaid Hundreds have the larger Quantity of Tithes of ſome Inhabitants, *viz.* of them who have Lands or Tenements there, and of others, as of manual Tradeſmen by Way of Offerings, and ſuch like, and that in reſpect thereof no Tithes have been paid Time out of Mind for the grinding of this Corn ſo employ'd:

And preſcribes in non Decimando.

This was held to be a good Cuſtom, and a ſufficient Diſcharge, and a Prohibition was granted accordingly; and this, altho' the Baker did inhabit in one Hundred, and erected his Mill in another, for that two Hundreds may preſcribe in *non Decimando*. *Kidden* and *Edward's* Caſe. 1 *Roll. Abr.* 654.

If there have been two ancient Corn-Mills, for which Time out of Mind 6 *s.* 8 *d.* hath been paid for the Tithes, and afterwards by Continuance of Time, the Mill Stream changes its Courſe, and runs ſomewhat diſtant from its ancient Stream, and thereupon the Owner of the Mills pulls down one of them, and rebuilds it in the new Place where the Stream now runs: This ſhall be diſcharg'd of the Payment of any Tithes by Force of the ancient *Modus*; for this comes by the Act of God, and not by the Act of the Party. 1 *Roll. Abr.* 641. reſolv'd *per Cur. & ibid.* 652. *F.* 1.

Mill diſcharged by the Act of God.

But note; the Court there ſaid, if the Stream be alter'd by the Act of the Owner himſelf, Tithes ought to be paid thereof, as for a new Mill. *ibid. &* 651. *F.* 2. 4 *Co.* 87.

It is ſaid in *Cumberbach's Reports*, *pag.* 404. that neither the Tithe of Wood, nor the Tithe of Mills, are due of Common Right, but

Tithe of Mills not of Common Right, &c.

but payable only as a Cuſtomary Tithe, and therefore I conceive it only perſonal, for all Predial Tithes are due of Common Right.

Note alſo, that a Hundred or Country can't preſcribe in *non decimando*, for Things tithable of Common Right; but otherwiſe of Things not tithable of Common Right, as of *Mills*, in the Caſe of *Kidden* and *Edwards ſupra*. See alſo the Caſe of *Hicks* v. *Woodſon*. *Cumberb.* 403, 404. 4 *Mod.* 336. *Skinner* 560. and 1 *Salk.* 655.

Having thus, as I apprehend, ſufficiently clear'd the Queſtion, Whether the Tithe of Mills is Predial or Perſonal, and ſhewn it to be merely Perſonal; I ſhall now proceed to ſhew what other Tithes do alſo fall under the Denomination of Perſonal.

Other Perſonal Tithes.

And this will beſt appear by conſidering the Definition of thoſe Tithes before given, pag. 8. and in the Beginning of this Chapter. For as they ariſe from the *clear Gains made by honeſt Labour, Art or Induſtry*, it will include not only all Kinds of Trades and Manual Occupations, but alſo all other lawful Employments and Profeſſions of Life, whereby any clear Gain or Profit is made. *Vide* 1 *Roll. Abr.* 656. *M.* 1. *Lit. Rep.* 147. 2 *Inſt.* 621, 649, 557.

From whence it appears,

1. That the Occupation or Employment muſt be honeſt or lawful. For of Profits made by unlawful Employments no Tithes are to be paid, the Church abhorring to be fed with ſuch contaminated Morſels.

And

And yet the Canoniſts do admit that if a Robber or Thief, &c. ſhall with his unlawful Gains purchaſe Lands, the Tithes of ſuch Lands are due *Jure Divino*, as appears by *Lindwood* and Pope *Gregory*'s Decretals, cited by *Degg*. Vide Degg, Lib. 2. c. 22.

2. That the Gains muſt be clear, *i.e.* all Charges and Expences deducted. From whence it follows, that in the Caſe of Fiſhers, Hunters, Fowlers, and other like Employments, no Tithes can be due of common Right, 'till the clear Profits are aſcertained; and conſequently that of common Right, Tithes in Kind are not to be paid, but only the Tenth of the clear Profits made upon the Sale, after all Charges and Expences deducted. *Not due in Kind, nor 'till the Gain aſcertained.*

And yet by Cuſtom a perſonal Tithe may be paid in Kind of Things taken or acquired by Fiſhing, Hunting, or Fowling, as will appear from divers Caſes hereafter mentioned. We ſhall firſt conſider the Tithe of Fiſhing, I ſay of Fiſhing, not of Fiſh (though commonly ſo denominated.) For that the Tithe ariſes from the Profits of the Employment, and not from the Thing or Fiſh taken; and that where Cuſtom has made it payable in Kind, it is as a *Modus* or Compoſition in Lieu of the Profits. Contra *by Cuſtom.*

It is commonly ſaid in our Books, that no Tithes are due of common Right for Things that are *Feræ Naturæ*, and yet by Cuſtom Tithes may be payable of or for ſuch Things; of which ſome Inſtances are given in the former Chapter. *Tithe of Things* Feræ Naturæ, *as Fiſh*, &c. Degg, *Lib.* 2. *cap.* 8.

And

And Sir *S. Degg* confeſſes, that by the Common Laws of *England*, no Tithe is due for Birds, Beaſts, *&c.* That are *Feræ Naturæ*; and therefore it has been reſolved, that no Tithe ſhall be paid for Fiſh taken out of the Sea or River, unleſs by Cuſtom, as in *Wales*, *Ireland*, *Yarmouth*, &c. Neither for the ſame Reaſon is any Tithe due of Deer (Hares) Conies, *&c.* and yet, if it be due by Cuſtom, it muſt be paid. See *Cro. Car.* 264, 339. *March* 87. *Hetl.* 13. *Noy* 108. 1 *Roll. Abr.* 635. *Rep. Can.* 367, 375, 379, and 406. and Stat. 2 *Ed.* 6. *c.* 13.

Deer, Conies, &c.

As where Fiſh are taken in the Sea, tho' they are *Feræ Naturæ*, and conſequently not Tithable of Common Right, yet by the Cuſtom of the Realm they are Tithable as a Perſonal Tithe, *i. e.* not by the Tenth Fiſh or in Kind, but by ſome ſmall Sum of Money in Conſideration of the Profits made thereby. See 1 *Cro.* 192. *Rep. Can.* 406.

Fiſh taken in the Sea, no Tithes de Jure, *but by Cuſtom,*

Therefore if the Owner of a Ship do lend it to Mariners to go to *Iſland*, *&c.* for Fiſh, for a certain Quantity of Fiſh to be paid to him upon their Return; no Tithes ſhall be paid by the Mariners unto the Parſon out of the Fiſh which the Owner ſhall have for the Hire of the Ship, for that it is a Perſonal Tithe, and therefore ought to be paid but of the clear Gain. *Dodderidge* 1 *Roll. Abr.* 656.

And only Perſonal.

And ſo in *Devon* is the Cuſtom, upon the Hire of a Ship or Boat to take Pilchards or Herrings. *Per Dodderidge*, 1 *Roll. Abr.* 656. N. 2.

And the Law ſeems the ſame with Reſpect to the Reſidue of the Fiſh; for no Tithes ſhall be paid in Kind of Fiſh taken in the Sea without a Cuſtom, for they are *Feræ Naturæ*, and the Sea is not within any Pariſh. *Noy* 108. *Cro. Car.* 264. and ſo is the Caſe of *Long* and *Dircell.* 1 *Roll. Abr.* 636. *per Curiam.* And a Prohibition granted accordingly.

Note alſo, that Juſtice *Jones* in the ſame Caſe ſaid, that upon an Appeal to the Delegates out of *Ireland* in the Lord *Deſmond*'s Caſe it was agreed, that for Fiſh ſo taken only Perſonal Tithes are due, *deductis Expenſis.*

So Tithes of Fiſh taken at *Greenland*, or of Herrings or Pilchards upon the Sea, are Perſonal Tithes. 1 *Roll. Abr.* 656. And that Tithes thereof are only paid by particular Cuſtom, ſee 2 *Roll. Rep.* 419. and 1 *Roll. Abr.* 636. *Noy* 108.

Alſo, where upon a Suit in the Spiritual Court for the (cuſtomary) Tithe of Fiſh taken in the Sea, a Prohibition was prayed. *Firſt*, For that Fiſh in the Sea, or great Rivers, are *Feræ Naturæ*. And *Secondly*, For that the Sea is not within any Pariſh, ſo that no Parſon can ſay, that that Part thereof where the Fiſh are taken, is within his Pariſh. For (as *Jones* affirmed) Tithes of Fiſh are uſually, (*i. e.* by Cuſtom) paid in *Ireland*; and that in *Cornwall* they pay Tithes for fiſhing in the Sea; and that it is a Cuſtom in *Yarmouth*, that Tithes ſhall be paid by Cuſtom; and in ſuch Caſes the Tithe is to be paid to the Parſon of the

The Sea not in any Pariſh;

Yet payable where landed. Pariſh, where the Fiſh is landed. But no Tithes ſhall be paid in Kind of Fiſh taken in the High Sea, without a Cuſtom for it. 1 *Roll. Abr.* 636. *Holland* v. *Heal. Noy* 108.

Fiſh, taken in a common River. Alſo the Tithe of Fiſh taken in a common River is but a perſonal Tithe, and therefore no Tithe in Kind is to be paid thereof *de Jure*, without a Cuſtom for it; but the Expences in taking them are to be deducted; and this is ſo although they be taken by one who has a ſeveral Piſcary in ſuch River, and though the Place where they are taken be within the Pariſh of the Parſon that claims them. And the Reaſon given is for that they are *Feræ Naturæ*. 1 *Cro.* 339. 1 *Roll. Abr.* 636. N°. 7. See alſo *Palm.* 527. *Lit. Rep.* 311. *March* 15.

Alſo, no Tithes *de Jure* are to be paid for Fiſh taken in a common River; and, *Paſ.* 5. *Car.* 1. *B. R.* a Prohibition was granted to ſtay a Suit for Tithes of Eels taken in a common River in the Pariſh of *Barton* in *Weſtmorland*. And *Hill.* 9 *Car.* 1. a Prohibition was to ſtay a Suit for Tithes of Trouts in the ſame River, though the Court were then divided whether Tithes were due or not; but they granted the Prohibition in order to decide the Law thereupon. 1 *Roll. Abr.* 635. *c.* 4. See *March* 17. *Davis* 56. *Cro. Car.* 339. and 1 *Ventr.* 5.

Stat. 2 & 3 *Ed.* 6. *c.* 13. *Of tithing on the Sea Coaſts.* And as to the Cuſtom of Tithing Fiſh in Pariſhes bordering on the Sea Coaſts, the Statute of 2 & 3 *Ed.* 6. *c.* 13. Provides, 'That neither the ſaid Act, nor any Thing 'therein contained, (with Reſpect to Per-'ſonal Tithes) ſhall extend to any Pariſh 'which

'which ſtands upon, and towards the Sea 'Coaſts, the Commodities and occupying 'whereof conſiſteth chiefly in Fiſhing, and 'have by Reaſon thereof uſed to pay and 'ſatisfy their Tithes by Fiſh; but that all 'and every ſuch Pariſh and Pariſhes ſhall 'hereafter pay their Tithes according to 'the laudable Cuſtoms, as they have here-'tofore of antient Time within theſe Forty 'Years uſed and accuſtomed, and ſhall pay 'their Offerings as is aforeſaid.' *Vide* Stat. 2 & 3 *Ed.* 6. *c.* 13. *Sect.* 11.

Cuſtom to pay leſs than a Tenth.

And according to this Statute, when one libelled in the Spiritual Court for the Tithes of *Pilchards* taken in the Sea, a Prohibition was granted upon the Surmiſe of a Cuſtom there, that the Owner of the Fiſher-boat hath one Moiety of the Fiſhes, and the Fiſhermen the other Moiety; and that the Owner hath uſed to pay the Tenth of his Moiety for all; this Surmiſe was held to be good and ſufficient. *Hill.* 1 *Jac. C. B. Noy* 108.

And ſo when a Surmiſe was, that all the Fiſh of a Ship ſhould be divided into ten Doles (after the Owner's Part was ſeparated from them, for the Uſe of the Ship) and then the Tenth Dole to be divided, one Moiety whereof to be to the Parſon, and the other Moiety to the Town, *viz.* of *Tarmouth*, this was admitted to be good. See 1 *Roll. Rep.* 419.

So in the Caſe of *Shepperd* and *Penroſe*, *Paſ.* 18. *Car.* 2. *B. R.* where a Prohibition was for ſtaying a Suit in the Eccleſiaſtical Court for Tithes of Fiſh taken in the Sea, and for Tithes of Corn; where the Queſtion

was whether the twentieth Fiſh was a good Payment in Satisfaction of all Fiſh there taken, and if the twelfth Sheaf was good in Satisfaction of all Sheaf-Corn.

Good of Fiſh, not of Corn.

And by the whole Court, Tithes of Fiſh are not due without a Cuſtom, and therefore a Cuſtom to pay leſs than a tenth Part thereof may be good. But of Corn, the tenth Part may be due of (common) Right; and therefore thereof a Cuſtom to pay nothing (leſs) is not good without other Matter. But they granted the Prohibition as to the whole, *niſi Cauſa*, with Intent to hear what the other Party had to ſay. 1 *Lev.* 179. See 1 *Siderfin* 278. 2 *Keeb.* 2. *S.C.* 1 *And.* 199.

So no Tithes *de Jure* for Salmons taken in the River *Exe*, &c. See 1 *Roll. Abr.* 636. N°. 7.

Fiſh in a Pond.

It is alſo ſaid, that for Fiſh in a Pond no Tithes ſhall be paid. See *Rep. Can.* 375. But this ſeems to be too generally ſpoken; for, according to the Rule of Perſonal Tithes *ſupra*, where there ariſes any clear Gain or Profit by the Sale of Fiſh or any other Animals, though *Feræ Naturæ*, there a cuſtomary Tithe may be due; but no Tithe can be due, if they are kept only for Pleaſure, or to be ſpent in the Houſe or Family, as Fiſh kept in a Pond generally are.

Other Creatures tithable, though Feræ Naturæ.

And this Rule extends to all other Creatures that are *Feræ Naturæ*, where they are taken and kept for Sale; ſuch Cuſtomary Tithe as aforeſaid may be due and payable for them. But this being a perſonal Tithe is not of Right to be paid in Kind, except by Cuſtom.

For

For of Right all Charges and Expences of their Taking, Feeding, Sale, *&c.* are to be deducted, which cannot be till after ſuch Sale, and then the Tithe is to be paid in Money, *i. e.* the Tenth Part of the clear Profits only.

But if ſuch Creatures that are *Feræ Naturæ*, as Deer, Hares, Conies, Swans, Turkies, Geeſe, Ducks, Hens, Patridges, Pheaſants, Pidgeons, and the like, be kept for Pleaſure only, or to be ſpent in the Family, in ſuch Caſe I conceive no Tithes ought to be paid either of common Right or by Cuſtom.

And note; by this Rule many of the ſeeming Repugnancies in Judgments and Opinions concerning the Tithe of the Things above-mentioned may be well reconciled, and the ſame Thing may be eſteemed Perſonal or Mixt in different Reſpects. For Inſtance:

Geeſe, if they are fed at the Barn-Door, and fatted in or about the Houſe, and after ſold, in this Caſe the Tithe can only ariſe from the Profits made on the Sale after Charges and Expences deducted, and the like of their Eggs and Young, if ſold. *Geeſe.*

On the other Hand, if Geeſe are fed at large, as in Meadow and Paſture Ground, as in ſome Places and Counties they are, there the Feeding on the Graſs and Herbage prevents the Parſon of having a conſiderable Part of his Predial Tithes, and conſequently the Tithe of ſuch Geeſe and their Young, ought to be paid in Kind as a *Predial Mixt Tithe.*

And hence it is, that others of thoſe Creatures, which in the precedent Chapter are ranged under the Head of Mixed Tithes, may in this be alſo treated of as Perſonal Tithes, ſome whereof I ſhall here mention in an alphabetical Order.

Bees, &c.

Bees are *feræ Naturæ*, and therefore of them no Tithes are to be paid *de Jure*; but of their Wax and Honey 'tis ſaid Tithes are to be paid in Kind. *Cro. Car.* 519. 1 *Roll. Abr.* 633. *c.* 1. *Jon.* 447, S. C. And *Repert. Canon.* 389. ſays, the 10th Weight of Wax, and the 10th Meaſure of Honey is to be paid in Kind, and that they are Predial Tithes; I ſuppoſe, becauſe the Bees are ſaid to gather both *ex prædio*; but then it ought to be paid to the Parſon of the Pariſh where 'tis gather'd, which Enquiry would be worthy a Canoniſt. But to me, conſidering the perſonal Labour, Coſt, and Care that attend both the Bees, and their Honey and Wax, they are rather to be eſteem'd Perſonal than Predial Tithes, and conſequently that the Tithe ought to ariſe only from the clear Profits made thereby, all Charges and Expences deducted.

Vide *Honey and Wax*, infra.

Chickens.

Chickens of all tame Fowl are ſaid to be a Mixed Tithe, and therefore to be tithed in Kind. *Rep. Canon.* 39. and yet it has been reſolved, that no Tithes ſhall be paid of Chickens, becauſe Tithes are paid of the Eggs, and a Prohibition was granted accordingly, 1 *Roll. Abr.* 642. and conſidering the Care and Hazard that attends the Hatching and Breeding Chickens, it ſeems more reaſonable that no Tithes ſhould be paid of them

them in Kind, but only of the clear Profits which can be only a Perſonal Tithe. The Tithe of Eggs in Kind may be ſupported with better Reaſons. *Eggs.*

No Tithes *de Jure*, without a Cuſtom, ought to be paid for Conies, becauſe they are *Feræ Naturæ*. See ſeveral Prohibitions granted, and Conſultations deny'd for that Reaſon, and in one where the Parſon pleaded to have them by Preſcription, 1 *Roll. Abr.* 335. and they ſeem Perſonal, for that if a Man ſteal Conies out of a Warren, he ſhall pay no Tithes of them, becauſe the Law gives him no Property in them; nor ſhall the Owner pay any Tithes of them, for that he has no Profit by them; which ſhews the Tithe is to ariſe from the Profit made by them; and yet Tithes in Kind, or a *Modus* for them, may be by Cuſtom. See 2 *Roll. Rep.* 2. 458. *March* 56. 1 *Ventr.* 5. *Hetl.* 147. *Lit.* 13. *Hardr.* 188. *Rep. Can.* 393. *Conies.*

No Tithes of Common Right are to be paid of Deer, becauſe they are *Feræ Naturæ*. *Hetley* 147. But yet they may be given for, or in lieu of Tithes, *i. e.* for the Herbage they eat; and they may be given for a *Modus Decimandi*, *Noy* 148. and ſo in any other Thing perſonal, as Money, *&c.* may be given in lieu of a Predial Tithe by Compoſition or otherwiſe. *Deer.*

Doves in a Dove-Houſe, if ſold, do pay a Perſonal not a Predial Tithe, as was adjudg'd 15 *Car.* 1. and if ſtolen out of a Dove-Houſe, no Tithes ſhall be paid for them, for the Reaſon *ſupra* (as in the Caſe of Conies ſtolen) *Paſ.* 15 *Car.* 1. adjudg'd. *Doves,*

See *Rep. Can.* 405. where 'tis ſaid, that Tithes ſhall be paid *de Jure* of young Pidgeons, and ſo reſolved divers Times, and

And young Pidgeons. that by Cuſtom Tithes ſhall be paid of Pidgeons ſpent in the Owner's Houſe. But 'tis confeſs'd that this is contrary to common Right, and that generally they are only tithed if ſold, *i. e.* deducting the Expences, and ſo can be eſteem'd only a Perſonal Tithe.

Eggs. Eggs are either tithed in Kind, or according to the Cuſtom of the Place, and uſually ſerves for the Tithe of the Young of tame and domeſtick Fowl. *Vide* Chickens *ſupra.* And note; where Tithe of the Eggs is paid, there is no Tithe of the Young; and ſo *vice verſa. Rep. Can.* 405.

Fiſh. Fiſh taken in the Sea, or open Rivers, are titheable as a Perſonal Tithe; *vide ante* But if taken in a Pond, or a ſeveral Piſcary, they are ſaid to be tithable as a Predial Tithe, and as ſuch ought to be ſet forth in Kind according to the Statute 2 & 3 *Ed.* 6. See *Rep. Can.* 406. *ſed quære* if Law, & *vide ante.*

Fowl. If Fowl are taken by one who hawks for his Pleaſure, no Tithe ſhall be paid for them. But if a Fowler takes Fowl, and makes a Profit of them, he ſhall pay a perſonal Tithe for them; ſo adjudg'd 15 *Car.* 1. *B. R.* See *Rep. Can.* 408. & *vide ante.*

Geeſe. Of Geeſe we have already diſcourſed, and ſhewn in what Reſpects they may be eſteem'd either a Predial or a Perſonal Tithe, &c. *vide ante.*

The

The Tithe of Hares ſeems to be of the ſame Nature as Conies, *&c. Feræ Naturæ.* *Hares.*

Honey falls under the Rule of a Perſonal Tithe, and yet it is uſually paid in Kind, *viz.* either the 10th Meaſure, or 10th Pound, and the like Cuſtom is for Bees-Wax, *viz.* the 10th Pound in Kind. Now tho' both theſe are ſtrictly and properly Perſonal Tithes, yet it ſeems their being ſo uſeful to the Church formerly in compoſing of conſecrated *Tapers* and *Wafers*, She thought fit to tranſubſtantiate their Nature from Perſonal to a Predial Tithe, and accordingly claim'd their Payment in Kind; and our Anceſtors Zeal advanced that *Claim* to a *Cuſtom*, which is now confirm'd by modern *Practice.* *Honey and Wax.* *Note.*

A Prohibition was pray'd for ſuing in the Spiritual Court for Tithes of divers Kinds, and, *inter alia*, for Tithe of Honey, upon a Surmiſe, that it was not payable (in Kind) for that Bees are only *Volatilia* (*& Feræ Naturæ*) and it was thereupon demurr'd: But the Opinion of the Court was, that Tithes (in Kind) are to be paid for Honey, for ſo is the Book, *Fitz. Nat. Brev.* and therewith agrees *Lindwood*, and therefore the Court awarded a Conſultation in *Barſcot* and *Norton's* Caſe, *B. R. Cro. Car. p.* 3. *Intr. Mich.* 15 *Car.* 1. *Rot.* 1227. See *Rep. Can.* 414.

But note, by *F. N. B.* 51. *G.* and *H.* the Tithes of Honey, Cheeſe, Butter, and the like is to be claim'd by a Preſcription; whereas *Lindwood* and the Canoniſts claim *Note.*

Honey

Honey and Wax *Jure Divino*, for the Reaſons aforeſaid.

Partridges and Pheaſants. Partridges and Pheaſants, though made tame, do pay only a Perſonal and not a Predial Tithe. *Rep. Canon.* 428, 430. *a fortiori*, as I apprehend, where they are taken by a Fowler, *Feræ Naturæ*, and ſold.

If a Man hath Pheaſants (or Partridges) and keep them in an encloſed Wood, and clip their Wings, and they hatch Eggs, and breed up their Young, no Tithes ſhall be paid of theſe Eggs or Young, for they are not reclamed, but continue *Feræ Naturæ*, and would go out of the Encloſure, if their Wings were not clipt. And in this Caſe a Prohibition was granted. *Mich.* 11 *Car.* 1. *B. R. Windbrook* and *Evans.*

Note; in this Caſe it was ſurmiſed, that no Tithes were paid of them in a great Circuit call'd the *Chiltern*, in the ſame County, *viz. Bucks*, and ſo a Preſcription was laid in *Non Decimando*; but the Court granted the Prohibition, for that they were *Feræ Naturæ*. See *Rep. Can.* 430.

Turkies. So of Turkies Tithes ſhall not be paid, nor for their Eggs or Young, *quia Feræ Naturæ.* See *Moor* 599. *Houghton* and *Prince's* Caſe.

Q. Pidgeons. And methinks the like Reaſon ſhould prevail in Caſe of Pidgeons, *&c.*

Veniſon. *Veniſon*, tho' not tithable of itſelf, may yet be given in lieu of Tithes, and Tithes in Kind have formerly been paid thereof in ſome Places, and, as I think, to ſome Perſons only, as Biſhops, Abbots, *&c.* and that only

only by Grant. See *Rep. Can.* 454, and *Deer, Hares, &c. ante.*

Perſonal Tithes paid as Offerings, &c.

We ſhould now proceed to give ſome Inſtances of Perſonal Tithes of ſuch Trades and Employments, as live by buying and ſelling, or Manual Occupation. But theſe being now by Cuſtom generally reduced to the Payment of a certain Sum of Money in lieu thereof, are uſually paid at *Eaſter, Witſuntide, &c.* as meer Oblations and Offerings, and therefore may be conſidered under that Head.

And the only Caſe I can find for above 100 Years paſt, where the Tithes of the Profits of ſuch Trades have been ſued for by any Clergyman, is that of *Dolley* verſ. *Davis. Mich.* 11 *Jac.* 1. *B. R.* and is thus reported in 2 *Bulſtr. viz.*

Libel for Tithes of the Profits of an Inn-keeper.

A Parſon in *Briſtol* ſued an Inn-keeper there in the Eccleſiaſtical Court for the Tithes of the Profits by him made in his Kitchen, Stable, and Wine-Cellar, *&c.* and in his Libel ſays, that he made great Gain in ſelling of his Beer (having bought it for 500 *l.* and ſold the ſame for 1000 *l.*) and ſo libels for a 10th Part of the Profits of the ſame, which he thereby claims as due to him *per Communem Legem Angliæ:* And alſo ſets forth in his Libel, that *Negotiando & Trafficando* he made other Gain, of which he ought to have the Tithe.

Yelverton moved for a Prohibition, ſetting all the above Matter forth in his Suggeſtion, and further ſhew'd, that the Defendant had yearly of the Plaintiff 40 *l.* at leaſt (in Offerings,

ferings, &c.) *Doddridge:* Surely I think the Defendant would have Tithes alſo of the Kitchen Stuff. Whereupon *Clench*, Clerk of the Papers, inform'd the Court, that there was a Parſon (I think this very Defendant) who libell'd for the Tithes of the Intereſt of 100 *l.* put out at Intereſt, and a Prohibition was granted: And ſo in this Caſe, by Rule of Court, a Prohibition was awarded. See 2 *Bulſtr.*

A Prohibition awarded.

Oblations, Obventions, and Offerings,

As to Oblations, Obventions, and Offerings, they ſeem to be but one and the ſame Thing, and are of the Nature of Perſonal Tithes, as is ſaid *ſupra*; and ſo ſays *Godolphin*, in his *Repert. Canon.* 426. and that they are offered to God and his Church, and that Offerings are reckon'd among Perſonal Tithes, as ariſing by Labour and Induſtry, and are paid by Servants and others once a Year to the Parſon or Vicar, according to the Cuſtom of the Place.

Payable by Cuſtom.

Theſe are to be paid in the Place where the Party dwells, at ſuch four Offering-Days, as before the Stat 2 & 3 *Ed.* 6. *c.* 13. within the Space of 40 Years then laſt paſt, had been uſed for the Payment thereof, and in *London* are a Groat a Houſe. *Quære* in *York*, &c.

By Statutes 27 H. 8. and 32 H. 8, &c.

And by the Statutes now in Force they are to be paid as formerly they have been paid. 11 *Co.* 16. See the ſeveral Statutes *infra* touching this Matter, *viz.* Stat. 27 *H.* 8. *c.* 20. 32 *H.* 8. *c.* 7. 2 & 3 *Ed.* 6. *c.* 13. 7 & 8 *W.* 3. *c.* 6. 1 *Geo.* 1. *c.* 6. *Sect.* 2.

And as to Oblations, Obventions, and Offerings, which are all the ſame, it is enacted

acted by 2 & 3 *Ed.* 6. *c.* 13. *Sect.* 7 & 8. *Provided always, and be it enacted by the Authority aforeſaid, that all and every Perſon and Perſons (Merchants, Handicrafts, and Faculties) which by the Laws and Cuſtoms of the Realm, ought to make or pay their Offerings, ſhall yearly from henceforth well and truly content and pay his or their Offerings to the Parſon, Vicar, Proprietor (for Impropriator) or their Deputies or Fermors of the Pariſh or Pariſhes, where it ſhall fortune or happen him or them to dwell or abide, and that at ſuch four Offering Days, as at any Time heretofore within the Space of Four (for Forty) Years laſt paſt, hath been uſed and accuſtomed for Payment of the ſame; and in Default thereof, to pay for the ſaid Offerings at* Eaſter *then next following.*

Stat. 2, 3 Ed. 6. *c.* 13. *Sect.* 7, & 8. *Offerings.* Quære *Merchants, Handicrafts, and Faculties.*

And it is ſaid that in this Word *Offerings* are comprehended, not only thoſe ſmall Cuſtomary Sums commonly paid by every Perſon when he receives the Sacrament of the Lord's Supper at *Eaſter*, which in many Places is by Cuſtom two Pence for every Communicant; but alſo ſuch Cuſtomary Payments as are paid upon Marriages, Baptiſms, Churchings, and Burials; and that theſe properly belong to the Parſon or Vicar of the Church where they are made, and are recoverable by Law in ſuch Places and Caſes only, where there is a Cuſtom for the Payment of certain Sums, upon the Performance of theſe ſeveral Duties.

See Watſon, *pag.* 572. *Sacrament Fees, viz. Lord's Supper.*

As to Baptiſms, Burials, &c. ſee the Caſe of *Burdeaux* v. Dr. *Lancaſter*, & *al' Hill.* 9 *W.* 3. *B. R.* in 1 *Salk.* 332, *viz. Burdeaux* a *French Proteſtant* had his Child baptized at

And Baptiſms, Burials, &c.

the *French* Church in the *Savoy*, and Dr. *Lancaſter*, Vicar of St. *Martin's* (in which Pariſh the *Savoy* is) together with his Clerk, libelled for a Fee of 2 *s.* 6 *d.* as due to the Doctor, and 1 *s.* to the Clerk. And on Motion for a Prohibition, *Levinz.* for the Doctor urged, that this was an Eccleſiaſtical Fee, and due by the Canon.

But by *Holt*, Ch. Juſt. Nothing can be due of common Right, and how can a Canon take Money out of Laymens Pockets? *Lindwood* ſays, it is Simony to take any Thing for either Chriſtening or Burying, unleſs it be a Fee due by Cuſtom. But then a Cuſtom for any Perſon to take a Fee for chriſtening a Child, when he does not chriſten him, is not good, like the Caſe in *Hobart*, where one dies in one Pariſh, and is buried in another, the Pariſh where he died ſhall not have a Burying Fee. If you have a Right to chriſten, you ought to libel for that Right: But you ought not to have Money for chriſtening, when you do not. 1 *Salk.* 332.

No Fees unleſs by Cuſtom.

See alſo the Dean and Chapter of *Exeter's* Caſe, *Hill.* 5 *Annæ B. R. ibid.* 334. *viz.* Serjeant *Hooper* ſhewed Cauſe againſt a Rule for a Prohibition to the Spiritual Court, to ſtay a Suit there for a cuſtomary Fee of 10 *l.* as due to the Dean and Chapter of *Exeter* for burying in the Cathedral Church; *ſed non allocatur*; for no Fee is due for Burial of common Right. But where a Licence is neceſſary, the Perſon who gives it may ſtand upon his own Price. And whether there be ſuch a Cuſtom or no, it is triable at com-

mon Law. See 3 *Keeb.* 523, 527. 2 *Danv.* 424. E.

If the Cuſtom be not denied, the Spiritual Court ſhall proceed; for there is (then) no other Remedy. But if the Cuſtom be denied, a Prohibition ſhall go, not *propter Defectum Juriſdictionis*, but *triationis*. And ſaid, that Burial at Common Law ought to be in the Church-yard, and without Fee. (*Quære* 2 *Keeb.* 778.) 2 *Salk.* 334.

Other Things claimed as Oblations, &c.

It appears alſo by our Books, that the Clergy of old claimed, as Oblations or Offerings, whatever was fixt to, or hung up in the Church as Banners, Pennons, Eſcutcheons, Coat Armour, *&c.* Nay even the Monuments and Tombs of the Dead; as in the Caſe of the Lady *Wiche.* 9 *H.* 4. *viz.*

The Lady ſued by Bill in the King's Bench, and declares, *Quare cepit Tunicam unam vocatam* a Coat Armour, and Pennons, with her Husband Sir *Hugh Wich*'s Arms, and a Sword, *&c.* hung up in a Chapel where he was buried. And the Parſon by his Plea claimed them as Oblations. But it was held, that if one has a Seat in a Church or Chapel, and brings thither his Carpet, Livery, and Cuſhions, the Parſon cannot claim them as Oblations; nor could he claim Coat Armour, Pennons, *&c.* hung up in a Church; for they are placed there in Honour of the Dead.

But are not.

And the Chief Juſtice there ſaid, the Lady might well maintain her Action in that Caſe, during her Life, for that ſhe cauſed thoſe Things to be ſet up there, and after her Death the Heir ſhall have his Action for taking

king them, they being as Heir-Looms, which belong to the Heir. See 9 *H.* 4. 14. and 21 *E.* 3. 48. the Biſhop of *Carliſle*'s Caſe.

And herewith the Civil Laws agree. *Vide Rep. Can.* 155, 156.

No Tithe of Marriage-Goods in Wales, *&c.*

It ſeems likewiſe from ſome old *Britiſh* Cuſtoms, that the Clergy in *Wales*, &c. alſo claimed the Tithe of all the Goods and Chattles, which were given in Marriage with any Perſon; and this appears by the ſaid Statute 2 & 3 *Ed.* 6. *cap.* 13. *Sect.* 16. which recites, *Whereas heretofore ſuch a Cuſtom hath been in many Parts of* Wales, *that of ſuch Cattle and other Goods as have been given with the Marriage of any Perſon, their Tithes have been exacted and levied by the Parſons and Curates in thoſe Parts, which Cuſtom being diſſonant from any Part of this Realm, as it ſeemed (aroſe) when the ſaid Country of* Wales *was through Civil Diſſention unculted, for want of other ſufficient Profits that might otherwiſe grow to the Curates and Miniſters there, to have been for that Time tollerable; ſo now the Country there being well manured and husbanded, and the Tithe is duly paid there of Corn, Hay, Wool and Cheeſe, and of other Increaſe of all Manner of Cattle, as it is commonly in all other Parts of this Realm, the ſame Cuſtom ſeems to be grievous and unreaſonable, eſpecially where the Benefices are elſe ſufficient for the finding of the ſaid Miniſters and Curates.*

2 & 3 E. 6. c. 13. *Sect.* 16.

That it be therefore Enacted by the Authority aforeſaid, That from and after the firſt Day of May *next coming, no ſuch Tithes of Marriage-Goods be exacted or required of any Perſon*

Perſon within the ſaid Dominion of Wales, *or Marches of the ſame, any Thing in this Act contained, or any other Act, Cuſtom, or Preſcription had or made to the contrary hereof notwithſtanding.*

As to Mortuaries, although they, ſtrictly ſpeaking, do not fall under the Denomination of Tithes, yet ſeeing they were given or paid, as *Lindwood* ſays, *Pro Recompenſatione Subſtractionis Decimarum Perſonalium necnon Oblationum, i. e.* in Lieu of Perſonal Tithes ſubſtracted, and Oblations omitted, we may well range them under this Head. *Of Mortuaries.*

Theſe Mortuaries are ſometimes called Corſe (or Corps) Preſents, *i. e.* Preſents from the dead Corps in order to obtain a Remiſſion and Forgiveneſs for any Neglect or Omiſſion, during their Lives, in the Payment of ſuch Perſonal Tithes, Oblations, and other Church Dues.

And note; as to Mortuaries, it has been Enacted by Stat. 21 *H.* 8. *c.* 6. as follows, *viz.* *Mortuaries. Stat.* 21 H. 8. *cap.* 6.

Foraſmuch as Queſtion, Ambiguity and Doubt is chanced and riſen upon the Order, Manner and Form of demanding, receiving and claiming of Mortuaries, otherwiſe called Corſe Preſents, as well for the Greatneſs and Value of the ſame, which as hath lately been taken is thought over exceſſive to the poor People and other Perſons of this Realm, as alſo for that ſuch Mortuaries or Corſe Preſents have been demanded and levied for ſuch Perſons as at the Time of their Death have had no Property in any Goods or Chattles, and many Times for travelling and wayfaring Men in the Places where they have fortuned to die. To the Intent

(therefore) that all Doubt, Contention, and Incertainty herein, may be removed, and as well the Generality of the King's People therein remedied, as alſo of the Parſons, Vicars, Pariſh-Prieſts, and others, having Intereſt in ſuch Mortuaries and Corſe Preſents indifferently provided for;

Be it therefore Enacted, &c. That from and after the firſt Day of April 1530. No Parſon, Vicar, Curate, nor Pariſh-Prieſt, ne any other Spiritual Perſon nor their Fermors, Bailiffs, nor Leſſees, ſhall take, receive or demand of any Perſon or Perſons within this Realm, for any Perſon or Perſons dying within the ſame, any Manner (of) Mortuary or Corſe Preſent, ne any Sum or Sums of Money; ne any other Thing for the ſame more than is hereafter mentioned; ne alſo ſhall convent or call any Perſon or Perſons, before any Judge Spiritual, for the Recovery of any ſuch Mortuary or Corſe Preſents, or any other Thing for the ſame, more than is hereafter mentioned, upon Pain to forfeit for every Time ſo demanding, receiving taking, or conventing, or calling any ſuch Perſons before the ſpiritual Judge, ſo much in Value as they ſhall take above the Sum limited by this Act, and over that 40 s. to the Party grieved contrary to this Act. For which Forfeiture the Party ſo grieved ſhall have an Action of Debt by Writ, Bill, Plaint, or Information in any of the King's Courts; wherein no Wager of Law, Eſſoin, nor Protection ſhall be allowed.

Penalty for demanding more than allowed.

Not for Goods under ten Marks.

First, it is ordained, eſtabliſhed, and enacted, That no Manner Mortuary ſhall be taken or demanded of any Perſon whatſoever he be, which at the Time of his Death hath in move-

moveable Goods, under the Value of ten Marks. Alſo that no Mortuary ſhall be given or demanded from henceforth of any Manner Perſon, but only in ſuch Place where heretofore Mortuaries have been uſed to be paid and given, and in thoſe Places none otherwiſe, but after the Rate and Form hereafter mentioned; ne that any Perſon pay Mortuaries in more Places than one; that is to ſay, in the Places of their moſt Dwelling and Habitation, and there but one Mortuary. Nor no Parſon, Vicar, Curate, Pariſh-Prieſt or any other, ſhall for any Perſon dying or dead, and being at the Time of his Death (poſſeſſed) of the Value in moveable Goods of ten Marks or more, clearly above his Debts paid, and under the Sum of 30 l. *take for a Mortuary above* 3 s. 4 d. *in the Whole. And for any Perſon dying or dead, being (poſſeſſed) at the Time of his Death of the Value of* 30 l. *or above, clearly above his Debts paid in moveable Goods, and under the Value of* 40 l. *there ſhall no more be taken or demanded for a Mortuary than* 6 s. 8 d. *in the Whole. And for any Perſon dying or dead, having at the Time of his Death of the Value in moveable Goods of* 40 l. *or above to any Sum whatſoever it be, clearly above his Debts paid, there ſhall no more be taken, paid, or demanded for a Mortuary, than* 10 s. *in the Whole.*

The ſeveral Rates of Mortuaries.

Provided alway, That for no Woman being Covert Baron, nor Child, ne for any Perſon not keeping Houſe, any Manner Mortuary be paid, ne that any Parſon, Vicar, Curate, Pariſh-Prieſt or other, ask, demand, or take for any ſuch Woman, Child, or for any Perſon not keeping Houſe, dying or dead, any Manner,

Wives, Children and Travellers excuſed.

Thing, or Money by Way of Mortuary, ne alſo for any wayfaring Man, or other that dwelleth not, ne making Reſidence in the Place where they ſhall happen to die, but that the Mortuaries *of ſuch wayfaring Perſons be anſwerable in Places where* Mortuaries *be accuſtomed to be paid, and in Manner and Form, and after the Rate before-mentioned, and none otherwiſe, in Place or Places where ſuch wayfaring Perſons at the Time of their Death, had their moſt Habitation Houſe and Dwelling Places, and no where elſe.*

Proviſo *for Money, &c. bequeathed, &c.*

Provided always, that it ſhall be lawful to all Manner Perſons, Vicars, Curates, Pariſh-Prieſts, and other Spiritual Perſons, to take and receive any Manner Sum of Money, or other Thing which by any Perſon dying ſhall fortune to be diſpoſed, given, or bequeathed unto them or any of them, or to the High Altar of the Church, this Act or any Thing mentioned notwithſtanding.

Wales *and* Berwic, *&c.*

And be it alſo Enacted, That no Mortuary *or Corſe Preſents, ne any Sum or Sums of Money, or other Thing for any* Mortuary *or Corſe Preſent, ſhall be demanded, taken, received, or had in the Parts of* Wales, *nor in the Marches of the ſame, nor in the Towns of* Calice *or* Berwic, *nor in the Marches of the ſame; but only in ſuch Parts and Places of* Wales, *Marches and Towns aforeſaid, where* Mortuaries *have been accuſtomed to be taken and paid; and in thoſe Parts and Places no* Mortuaries *nor Corſe Preſents, ne any other Thing for* Mortuary *or Corſe Preſent from henceforth ſhall be demanded, taken, received, or had, but only after the Form, Order and*

Manner above ſpecified in this Preſent Act, and none otherwiſe, ne of any other Perſon or Perſons than is limited by this preſent Act, upon the Pain contained in this preſent Act.

Biſhops in Wales *may take* Mortuaries *of their Prieſts.*

Provided alſo, that it ſhall be lawful to the Biſhops of Bangor, Landaff, St. David's *and* St. Aſaph, *and likewiſe to the Archdeacon of* Cheſter, *to take ſuch* Mortuaries *of the Prieſts within their Dioceſes and Juriſdictions, as have been accuſtomed. Provided alſo, that in ſuch Places where* Mortuaries *have been accuſtomed to be taken of leſs Value than is aforeſaid, that no Perſon ſhall be compelled to pay in ſuch Place any other* Mortuary, *or more for any* Mortuary *than hath been accuſtomed, ne that any* Mortuary *in ſuch Place ſhall be demanded, taken, received or had of any Perſon or Perſons exempt by this Act, nor in anywiſe contrary to this Act upon Pain before limited.*

Stat. 12 Ann. *Seſſ.* 2. *c.* 6.

But note; by a Statute 12 *Annæ Seſſ.* 2. *c.* 6. All *Mortuaries* are now taken away in the ſaid Dioceſes of *Bangor*, *Landaff*, *St. David's* and *St. Aſaph*, and a Recompence is given in Lieu thereof to the Biſhops of thoſe Dioceſes. See the Act for this Purpoſe, and for annexing certain Prebends to the Maſterſhip of *Pembroke* College, Provoſt of *Oriel*, &c.

Penſions, &c. *Stat.* 26 H. 8. *c.* 15. *Archdeaconry of* Richmond.

Note alſo the Statute 26 *H.* 8. *c.* 15. For taking away Penſions, &c. (a Kind of *Mortuary*) in the Archdeaconry of *Richmond* in *Yorkſhire*; which Statute in the Preamble thereof ſets forth the intollerable Extorſion and Oppreſſion of the Clergy, thus:

Foraſmuch as divers and many of the King our Sovereign Lord's Subjects, inhabiting with-

in the Archdeaconry of Richmond *in the County of* York *be, and of long Time have been ſore and grievouſly exacted on, and impoveriſhed by the Parſons, Vicars, and other ſuch as have Benefices and Spiritual Promotions within the ſame, as by taking of every Perſon when he dieth in the Name of a* Penſion *or of a* Portion, *ſometimes the ninth Part of all his Goods and Chattles, and ſometimes the third Part, to the open and manifeſt impoveriſhing of moſt of all the King's poor Subjects, inhabited and deceaſing within the ſame.* It therefore Enacts, *&c.*

That no Manner of Spiritual Perſons, or others, having any Manner of Benefice or other Spiritual Promotion within the ſaid Archdeaconry, ſhall in no wiſe ask, levy, demand, or take after the Deceaſe of any Perſon or Perſons, any ſuch Portions or Penſions, nor any other Demand or Duty in the Name or Lieu of the ſame, upon Pain to incur ſuch Dangers, Forfeitures and Penalties, as are contained in the Statute of Proviſors made 25 Ed. 3. But that all and every the King's Subjects of the ſaid Archdeaconry, and their Executors and Adminiſtrators, ſhall henceforth be ordered, intreated and uſed for their Goods and Chattles after their Deceaſe, in like Manner, Form, Order and Condition, as is contained in the Statute made 21 H. 8. for Probate of Teſtaments, and none otherwiſe, any Cuſtom, Bull, Compoſition, Preſcription or Ordinance heretofore had, obtained or uſed, to the contrary within the ſaid Archdeaconry notwithſtanding.

Penalties.

Mortuaries payable only by Cuſtom,

See alſo the Caſe of *Broad* and *Piper*, *Mich.* 1 *W.* & *M.* in *B. R.* where it is agreed by

by the Court, that no Mortuary is due or payable, but by the particular Cuſtom of the Place. 3 *Mod.* 268. *Cumb.* 166.

Alſo a Mortuary is not properly and originally due to any Eccleſiaſtical Incumbent, Parſon, or Vicar, but from thoſe only of his own Pariſh, to whom he miniſtreth Spiritual Inſtruction, *&c.* See *Lindwood*, in his Gloſs on *C. Statutum vero ut infra, &c.* See alſo *Spelman*'s Treatiſe *de Sepultura, p.* 35. & *St.* 9 *E.* 2. *and to the Parſon of the ſame Pariſh.*

But notwithſtanding all this, 'tis ſaid the Prevalency of Cuſtom is ſuch, that in ſome Places of this Kingdom, Mortuaries are or have been paid to the Incumbents of other Pariſhes, that perform'd no Miniſterial Duties at all to the deceaſed Party, either living or dying. And 'tis ſaid, the *Stat.* 21 *H.* 8. *c.* 6. does not at all controul that Courſe, but makes Uſage of Payment to be the only Rule thereof, (altho' it ſeems an unreaſonable Cuſtom.) See *Rep. Can.* 424, 599. *Sometimes to others.*

In the Caſe of a Prohibition, for that the Defendant ſu'd in the Conſiſtory Court of the Biſhop of *Cheſter*, before the Commiſſary, for a Mortuary after the Death of every Prieſt within the Archdeaconry of *Cheſter*, *viz.* his beſt Horſe or Mare, his Saddle, Bridle, Spurs, his beſt Gown, his beſt Signet or Ring, his beſt Hat, his beſt Upper Garment under his Gown, as (due) to the Biſhop *de debito conſuetudine fore ſupponitur*, and recites the Stat. 21 *H.* 8. concerning Mortuaries. *By a Parſon to his Biſhop.*

The Plaintiff averr'd, there was no ſuch Cuſtom there, and that ſhe had already paid a *Mortuary* to the Parſon of *B.* and that, after a Prohibition, the Defendant had proſecuted his Suit in the Spiritual Court, and thereupon the Queſtions in *B. R.* were,

1. Whether there was a Cuſtom in that Place to give ſuch Thing for a Mortuary.

2. Whether, if ſo, it be a juſt Cauſe for a Prohibition, Mortuaries being only triable in the Spiritual Court.

3. Whether a Conſultation ſhould be granted without anſwering the Prohibition.

The Court ſeemed artfully divided in Opinion, and therefore ordered the Defendant ſhould plead or demur, and then they would give Judgment upon the Return before them. See 3 *Cro. Hinde* and the Biſhop of *Cheſter.*

Payable only by Cuſtom.

Note; my Lord *Coke* in 2 *Inſt.* 491. ſays, that no Mortuary is due by Law, only by Cuſtom; as is proved by the Words of the Statute *circumſpecte agatis*, which are, *ubi Mortuarium dare conſuevit*; and the conſtant Courſe of pleading, claiming them always by Cuſtom, ſhews it to be ſo. And note; *Selden* in his *Hiſtory of Tithes*, p. 287. ſays, the antient Uſe was to bring the Mortuary along with the Corps when it came to be buried, and preſented in its Name. *Ergo* commonly called *Corſe Preſents.*

This Cuſtom ſeems borrowed from the *Heathens*, and is too nearly allied to *Charon's* Fare to be good; and therefore I ſhall ſay no more, but *Malus uſus abolendus eſt.*

CHAP.

CHAP. V.

By whom Tithes are to be paid, the general Rules thereof, Caſes explaining thoſe Rules; where and to whom they are payable, or not, and the Rules thereof, with ſpecial Caſes thereupon; how and in what Manner they are payable, with the Nature of Cuſtom and Preſcription therein, and the ſeveral Statutes directing the ſame.

Who muſt pay Tithes.

HItherto we have conſidered Tithes in their ſeveral Kinds, Qualities and Incidents, chiefly with Regard to the Thing itſelf; we ſhall next conſider them, with Reſpect to the Perſons concerned therein, either actively or paſſively, *i. e.* who are to pay them, and to whom they are payable, with the *Modus ſolvendi*, or in what Manner they are to be paid, and the Incidents and Relatives thereof.

All, not particularly diſcharged.

Firſt then, it is generally ſaid, that antiently both by the Spiritual and Common Law, every Man, whether Alien or Denizen, Noble or Ignoble, Bond or Free, was bound to pay his Tithes. And ſo he is at this

this Day, except he can ſhew ſome ſpecial Exemption or Diſcharge, either by Compoſition, Cuſtom, Preſcription or Act of Parliament. See 2 *Co.* 44.

But what Lands and what Perſons may be diſcharged of Tithes, as alſo how and in what Manner it may be done, ſee the two following Chapters.

In the mean Time, as to the Perſon paying, we may obſerve the general Rules following, *viz.*

Taker of the nine Parts. 1. He that receives or takes the nine Parts to himſelf, is to pay the Tenth or other Part to the Parſon or other Proprietor, (but this ſeems to be meant of Predial or Mixt Tithes.)

Buyer. 2. If a Man buys Underwood of me, or Corn, or Graſs that is Tithable on the Ground ſtanding, he that buys it, and not I, muſt pay the Tithes thereof. But of the Things not growing on the Land, and fixed thereto, the Law ſeems otherwiſe. For,

Seller. 3. Where one ſells Sheep whereof the Parſon is to have a Rate Tithe, the Seller and not the Buyer muſt pay the Tithe for them. See *Dr.* and *Stud.* 171.

Buyer. 4. So where one ſells Underwood ſtanding, the Buyer and not the Seller muſt pay the Tithes.

Seller. 5. But if any Part thereof be cut (and ſo of young Trees felled or lopped, *&c.*) before the Sale, the Seller muſt anſwer the Tithe thereof.

6. So

6. So if one that is Owner of a Coppice, Wood or the like, cut it, and ſell it all together, in this Caſe the Seller and not the Buyer muſt anſwer for the Tithes.

7. So if one cut all the Graſs on his Ground, and put it in a Rick there, and three Months after ſell it away, the Seller and not the Buyer muſt anſwer for the Tithe; *per Cro.* Ch. Juſt. in *Aſhfield*'s Caſe.

8. If a Pariſhioner Let or Sell his Ground or Herbage, 'tis the Parſon may ſue either the Owner of the Ground, or the Owner of the Cattle at his Election for the Tithe: But *Quære* how far the Owner of the Land is to anſwer the Tithe of the Herbage of the Cattle. *Owner of the Land or Cattle.*

9. If Cattle, *&c.* be pawned or pledg'd, 'tis ſaid the Gagee muſt pay Tithe of them. *Gagee.*

10. But if I deliver Cattle or Goods to *A.* to be redelivered to me, I muſt pay the Tithe for them.

11. If a Pariſhioner die before he pay his Tithes, his Executor, if he have Aſſets muſt pay it; *Quære*, if the Heir be bound in the Caſe of Predial Tithes. *Executor, Heir. Quære.*

12. All Perſonal Tithes being payable by Cuſtom, are to be paid by ſuch as have been uſed to pay them. *Perſonal Tithes.*

13. But no Perſonal Tithe is to be taken of a Robber, Uſurer, Harlot, or the like; for their whole Gain is Sin.

14. In ſome Caſes the Parſon ſhall pay Tithes to the Vicar, and in others the Vicar *Parſon, Vicar.*

Vicar ſhall pay Tithes to the Parſon. *Vide infra* and 2 *Roll. Abr.* 335. *Pl.* 2, and 3.

King's Leſſee. 15. Alſo in ſome Caſes the King's Leſſee or Patentee of Lands diſcharged of Tithes, ſhall yet pay Tithes notwithſtanding ſuch Diſcharge. *Vide infra.*

The Caſes following may explain ſome of the Rules before-mentioned.

Vendor. If a Man ſells me Wood, and I burn it in my Houſe, the Vendor ſhall be charged with the Tithes, and not the Vendee; for no Tithes ſhall be paid by me for Wood burnt in my own Houſe. Reſolved *per Cur'.* and a Prohibition was granted accordingly, altho' it was ſaid, That by the Civil Law, the Parſon hath Election to ſue either Vendor or Vendee; but this croſſes the Common Law: And that the Parſon ſhall not be compelled to ſue the Vendee, who perhaps may be unknown to him, ſee *Noy* 152. *Palm.* 38. 2 *Roll. R.* 440. 1 *Roll. Abr.* 676.

Agiſtor. If *A.* agiſts the Cattle of a Stranger in his Land, the Parſon may ſue the Owner of the Land for the Tithes of the Paſture, otherwiſe it would be very Inconvenient for the Parſon to ſue every Owner of the Cattle; and it would alſo be very hard to know the Number of the Cattle, which perhaps are incertain, *&c. per Curiam.* 1 *Roll. Abr. ibid.*

Or Owner of the Cattle. And yet in the Caſe of *Perry* and *Wright Hardr.* 184. it was held *per Curiam*, That Tithes for the Agiſtment of Cattle are payable by the Owner of the Cattle: For the Cattle

Cattle take the Profits and Herbage of the Soil. So in the Caſe of Commoners. But the Ch. Baron ſaid, That the Owner of the *Soil*, (Cattle) might pay them, but clearly the Agiſtor is compellable to pay them. *Hardr.* 184. See *Cro. Car.* 237. the Caſe of an Agiſtor *ſupra*; but the ſame Point does not appear, but it does in *Jon.* 254. And there it ſeem'd to the Court well in Reaſon, and that the Suit was well brought againſt the Owner. But howſoever it be, they adjudg'd, That it belong'd to the Spiritual Court to determine whether the one or the other ought to be ſued; and therefore as to this Point a Conſultation was granted *per Curiam.* See *Hard.* 35. S. C. cited.

If a Man has a Nurſery of Trees, and he ſells them, and pulls them up himſelf, he ſhall pay the Tithe; but if he ſells them particularly (*i. e.* ſtanding by Parcels) to another, the Vendee ſhall pay the Tithe, *Hardr.* 380, 381. *per Curiam.* And ſo in the Caſe of Tithe of Corn, if it be ſold ſtanding, the Vendee ſhall pay the Tithes; but if ſold after Severance, the Vendor muſt pay it. 2 *Roll. Rep.* 78. *Vide ſupra.* *Vide* 2 Danv. 614.

If a Parſon ſows his *Glebe*, and afterward leaſes over the Land, and the Leſſee ſevers the Emblements, he ſhall pay Tithes for them to the Parſon. 1 *Roll. Abr.* 655. K. 1. *per Fenner.* And of this Opinion was *Coke* Ch. Juſt. 2 *Bulſtr.* 184. *Cro. El.* 578, 579. *Moor* 910. See alſo 2 *Roll. Abr.* 57. *V.* 2. *Moor* 47, 50. *Hetley* 31. *Noy* 132. *Savil* 3. *Palm.* 38. *Dier* 43. *Parſon Leſſee of* Glebe.

If

Vendee of Emblements. If a Parſon ſows his *Glebe*, and after ſells over the Emblements, the Parſon ſhall have the Tithes of them, notwithſtanding his own Grant; adjudged and affirmed in a Writ of Error, 1 *Roll. Abr.* 655. K. 2. and the ſame Caſe is Reported as ſo adjudg'd, *Cro. Jac.* 362. and likewiſe in 1 *Bulſtr.* 183, 184. That the Land ſowed was *Glebe* Land, or that he was Parſon at the Time of Sale, ſo that he might become ſo afterwards.

Succeſſor. If a Parſon ſows his *Glebe*, and dies before Severance, and after a Succeſſor is inducted, and then the Executor or his Vendee, ſevers the Emblements, the Succeſſor ſhall have Tithes of them. For though the Executor repreſents the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, foraſmuch as another is inducted. 1 *Roll. Abr.* 655. See this doubted, *Hob.* 188. But 1 *Brownl.* 69. Where the Court inclined accordingly. See alſo *Moor* 47. *Pl.* 140.

If a Parſon ſows his *Glebe*, and is after depoſed before Severance, and another is inducted, it ſeems he ſhall have the Tithes of his Predeceſſor. (*Quære* if there be not a Diverſity where he dies before the *Annunciation*, and where after?) *Ibid. per Cur.* And ſo is 1 *Bulſtr.* 184. *per Coke*, Ch. Juſt.

Occupiers of Aliens Lands. Note; by Statute 6 *H.* 4. *c.* 11. The Farmers or Occupiers of the Lands of Aliens ſhall pay Tithes, though the Lands be ſeized into the King's Hands. 2 *Danv.* 613.

The King's Alienee. Alſo tho' the King himſelf is diſcharged from paying Tithes whilſt the Lands are in the Poſſeſſion of the Crown, yet his Leſſee, Patentee

Patentee or Alienee ſhall in divers Caſes pay Tithes, as before is obſerved.

In a Prohibition the Plaintiff preſcribed, That K. *Ed.* 6. was ſeized *de nuper deafforeſtata Foreſta de* Savernack *in Com.* Wilts, whereof 2 Acres of Wood, called *Wickham Huſſocks*, within the Pariſh of *Pewſey*, was *a Tempore, &c.* Parcel: And that K. *Ed.* 6. and all his Progenitors and Predeceſſors, Kings of *England*, *Foreſtam prædictam cum pertinen' unde, &c. habuerunt & gaviſi fuerunt exoneratam acquietatam immunem & privilegiatam de & a ſolutione omnium & ſingularium Decimarum quarumcunq; Rectori Eccleſiæ parochialis de* Pewſey *predict' ſeu Firmario ſuo pro tempore exiſten' ſolubilium infra Foreſtam prædictam ſeu aliquam inde parcellam creſcentium renovantium provenientium & contingentium Rectori Eccleſiæ de* Pewſey *predict. ſeu ejus Firmario pro Tempore exiſtenti ſolubilium.* And that King *Ed.* 6. by Deed enrolled, conveyed the ſaid Foreſt to the Duke of *Somerſet* in Fee, and that it was conveyed from him, by mean Conveyance, to the Plaintiff, the now Earl of *Hartford* in Fee, and that the Defendant being Parſon of the ſaid Pariſh, had ſued for Tithes of the ſaid twenty Acres of Wood. To which the Defendant pleaded for a Conſultation, that the ſaid twenty Acres were not Parcel of the ſaid Foreſt; upon which an Iſſue being joined, a Verdict was given for the Plaintiff. And it was afterwards moved in Arreſt of Judgment, that this Preſcription in *non Decimando*, which was laid in the King, and his Progenitors Kings of *England*, was Perſonal,

ſonal, and did not extend to the King's Alienee, *&c.* And after ſeveral Arguments at the Bar, it was adjudged, *per Tot. Cur.* (without any Argument by them) That the Plaintiff could not take Advantage of this Preſcription; and a Conſultation was granted accordingly.

Grounds of the King's preſcribing in non Decimando.

For the Ground of this Preſcription in *non Decimando*, muſt be either becauſe it was a Foreſt, and ſo could not render Tithes whilſt it was uſed with wild Cattle, *i. e.* Deer, *&c.* or becauſe the King was not within the Council of *Lateran*, which ordained the Parochial Right, or becauſe the King is *perſona mixta*, and ſo might preſcribe in *non Decimando* as a Spiritual Perſon; in all which Caſes it could not extend to the King's Alienee. For the ſaid Foreſt being diſafforeſted, ſee *Cro. C.* 20. *Hetley* 60. *Stil.* 137. may now render Tithe in Kind. And it ſhall not be intended that any real Compoſition or Conſideration was given for this Diſcharge, without ſhewing thereof ſpecially, no more than in Caſe of a Spiritual Perſon or Abbot, that makes ſuch a Preſcription, *Paſ.* 11 *Car.* 1. *B. R.* In the Caſe of the Earl of *Hartford* and *Leech*, adjudged. *Intr. Hill.* 8 *Car.* 1. *Rot.* 565. 1 *Roll. Abr.* 654, 655. See 1 *Jon.* 387. the ſame Caſe adjudged.

Patentee of Abby Lands, &c.

And ſo it ſeems in the Caſe of the King's Patentee of Abby Lands, *&c.* For if a Man preſcribes that ſuch an Abbot and his Predeceſſors have Time out of Mind held certain Lands diſcharged of the Payment of Tithes, and that this Land came afterwards on

on the Diſſolution by the Stat. 27 *H.* 8. to the Crown, and ſo derives a Title to it from the Crown; the Patentee ſhall not have Advantage of this Preſcription, by the Common Law, without the Help of any Statute, becauſe it ſhall be intended, that this Diſcharge was by Reaſon of ſome perſonal Privilege given to the Abbot and his Predeceſſors, and ſo is gone by the Diſſolution of the Body politick. (See 1 *Jon.* 3.) and not in Reſpect of any real Compoſition, as was adjudged *Paſ.* 7. *Car.* 1. *in Scaccario*, *Clark* verſ. *Ward*, and *Mich.* 10. *Car.* 1. *B. R. Siddown* and *Holmes*. *Per Cur.* upon a Demurrer, ſee *Cro. Car.* 422. and 1 *Jon.* 368. and 373. S. C. adjudged by *Bramſton*, *Jones* and *Barkley* (contra *Croke*) That the Preſcription in *non Decimando*, was gone by the Common Law; and the like was adjudged, *Hill.* 11 *Car.* 1. between *Cock* and *Thorpe*, upon a Demurrer without Argument, but alſo againſt the Opinion of *Croke*. *Intr. Paſ.* 11 *Car. Rot.* 28. See 1 *Roll. Abr.* 654.

So in Debt upon the Statute 2 & 3 *Ed.* 6. *c.* 13. for not ſetting out of Tithes, on *nil debet pleaded* it was found, that the Abbot of *A.* was ſeized in Fee, and that he and his Predeceſſors, Time out of Mind, had held the ſame diſcharged of Tithes. And he granted the Lands to *All-Souls* College in *Oxford*, &c. And it was adjudged for the Plaintiff, *per Totam Curiam*. For that this could not be intended a Diſcharge by real Compoſition, *&c.* it not being ſo pleaded, or found ſo by the Jury, but that it was only a meer Preſcription, and Perſonal to

the Abbot, and did not run with the Land. *Trin.* 18 *Car.* 2. between *Bolls* and *Atkinſon*, adjudged 1 *Lev.* 185. and 1 *Sid.* 320. adjudged. See alſo 1 *Lev.* 189. *Skinner* 51, 239.

Theſe three laſt Caſes ſhew, that Tithes ſhall be paid of Crown and Abby Lands in the Hands of Alienees, Grantees, Patentees, *&c.* But where and in what Caſes ſuch Lands are diſcharged of Tithes, or not, will hereafter appear more at large in the following Chapter, and in Chapter 7. concerning Preſcriptions, Compoſitions, *&c.*

Of Foreſt Lands, &c. no Tithes.

We ſhall therefore here under this Branch only note, that as to ancient Foreſt Lands that continue to be ſo, and Lands Extraparochial, *i. e.* Lands lying in no Pariſh, or between two Pariſhes, neither the King, nor his Alienee or Patentee ſhall pay Tithes of ſuch Lands.

And it is ſaid, if a Biſhop had held Land diſcharged of Tithe, and had made a Feoffment or Leaſe of it, ſuch Feoffee or Leſſee ſhall not pay Tithe. See 2 *Coke* 44.

And ſo the Vicar in ſome Places pays no Tithes to the Parſon, as long as the Vicarage Lands are occupied by himſelf. See 2 *Cro.* 44. *Cromp. Juriſd.* 60. *Bro. Diſms* 10.

As to the ſecond Head or Diviſion of this Chapter, to whom Tithes are to be paid, *&c.* we may obſerve the following general Rule, *viz.*

1. It is uſually ſaid, that at Common Law no Lay Perſon was capable of Tithe, but by Way of Diſcharge or

Compoſition with the Vicar. *Sed Quære de hoc.*

2. But now without Queſtion, Laymen as well as Clergymen are capable of Predial Tithes, and may have or receive, or retain them to their own Uſe. 4 *Co.* 79.

3. But perſonal Tithes are always to be paid to the Parſon or Vicar of the Place where the Perſon, that is to pay the ſame, doth dwell.

4. Tithes muſt be paid to him that hath Right to them, be he a Layman, as the Impropriator, or Clergyman, as the Parſon or Vicar.

5. The Tithe generally is to be paid to the Parſon or Vicar of the Pariſh where it ariſes, and not to the Parſon or Vicar of another Pariſh.

6. Yet by ſpecial Preſcription a Parſon or Vicar may have Tithe, or a Portion of Tithe in a Place out of his Pariſh, and in another Pariſh. See 11 *Co.* 19. 2 *Co.* 43.

7. And if one have Titheable Cattle going in a Waſte or Common, whereof the Pariſh is not certainly known, he ſhall pay the Tithe thereof to the Parſon where he dwells. *Per* Statute 2, 3 *E.* 6. *c.* 13.

8. But in other Caſes, the Tithes that come out of any Ground which is extraparochial, and lies not in any Pariſh, the King ſhall have them.

9. Where Beaſts or Cattle go in one Pariſh one Part of the Year, and in an-

other Pariſh another Part of the Year: The Parſons of either Pariſh ſhall have the Tithe for the reſpective Time they fed in either Pariſh. But if leſs than a Month, no Tithe is due.

10. And this Rule is to be obſerved, though the Cattle ſtrayed into ſuch other Pariſh, or otherwiſe, unleſs it be in the Caſe of intercommoning, *par Cauſe de Vicinage*, &c. *Bro. Diſm* 17.

11. If one that is a Common Hunter, Fiſher, or Fowler, lives in the Pariſh of *A.* and Hunts, Fiſhes, or Fowls in the Grounds of *H.* in *B.* if this were done free, and without Reward to *H.* it is a perſonal Tithe, and muſt be paid to the Parſon of *A.* But if *H.* received Money or other Reward for this, it is then ſaid to be a Predial Tithe, and is to be paid by *H.* to the Parſon of *B. Quære.*

12. Although one be wrongfully collated by the Biſhop, yet he is ſuch an Incumbent as is capable of Tithes, and may ſue for them. *Hob.* 302.

13. Yet if a Pariſhioner pay his Tithes to one that comes in by Simony, it is at his own Peril, and he may be forced to pay it again. *Hob.* 168.

14. If one be put into a Benefice, and he is afterwards removed, and another put in, it is ſaid he that was firſt put in ſhall have the Tithes that happen during the Vacation Time. *Hill.* 18 *Jac.* 1. *Wood's* Caſe.

15. But in the ſame Caſe it was held, That on Death, Reſignation, *&c.* the ſucceeding Parſon is to have the Tithe happening in the Time of Vacation. But they that gather it in, may keep ſo much thereof in their Hands, as to pay them their Charge in collecting, and for Miniſters for ſerving the Cure.

16. A Clark (or Vicar) of a Pariſh cannot preſcribe to have *5 s.* a Year of the Parſon for the Tithes of a Place in the Pariſh; but upon a Compoſition between the Parſon and Vicar, ſuch a Preſcription (Agreement) may be good. *Moor*, Caſe 1274.

17. Alſo a Man may have his own Tithe of the Parſon, by Agreement between them, either during the Parſon's Life, or *quamdiu ambobus partib' placuerit, &c.* See 2 *Co.* 43. 11 *Co.* 19. 1 *Lev.* 24.

18. And note; it was ruled at the Aſſizes, That if a Man ſows his Lands with Clover, and makes his Profit by the Seed, this being a Grain, the Parſon ſhall have Tithe of it; but if he converts it into Hay, and makes his Profit of the Hay, the Vicar being endowed of the Tithe of Hay, ſhall have it as a ſmall Tithe. See *Skinner* 341.

19. Note alſo the Caſe of *Watſon* and *Liſle*, *Paſ. & Trin.* 5. *W. & M.* as reported by *Skinner*, p. 341, and 346. Where on a Special Verdict it was found, that twenty-ſix Acres only, in a Pariſh conſiſting of one Thouſand two

Hundred, were ſown by ſeveral Perſons with Flax; and adjudged, that this was a ſmall Tithe, and belonged to the Vicar, who was endowed *de minutis decimis*; yet ſee *ib.* 346. *contra*, as to *minutis decimis*. See 4 *Mod.* 184.

20. A Parſon purchaſes Lands within his Rectory, and afterwards leaſes the Rectory; the Leſſee ſhall have the Tithes of the Lands ſo purchaſed. 11 *Co.* 14.

21. A Vicar had Glebe Lands, which were diſcharged of Tithes, being in his own Hands, but when let out, did pay Tithes; the Vicar ſowed the Lands, but died before it was ſevered. *Quære* if his Executors ſhould pay Tithes, *&c.* See *Hob.* 188.

Note alſo, that though it be generally ſaid, that of Common Right Tithes are only due or payable to Spiritual Perſons, or to Mixt Perſons, as the King; yet it appears by ſeveral of the precedent Rules, that by Preſcription, or otherwiſe, they may be due and payable to meer Laymen. And accordingly it was held in the Caſe of *Payne* v. *Brigham*. 36 & 37 *Car.* 2. and 1 *Jac.* 2. in *B. R.* That a meer Layman may well alledge a Seiſing in Fee of Tithes, tho' he can't recover thereupon without ſhewing how he is ſo ſeized. See *Nelſ. Lutw.* 418. and 2 *Cro.* 437. See alſo 2 *Mod.* 320. and 321. *Poll.* 623. where and in what Caſes a Layman may preſcribe for Tithes, and in what Caſes he may preſcribe in *non Decimando*. *Vide poſt.* Chap. 7.

Layman may preſcribe.

If

If a Parſon ſows his *Glebe*, and afterwards leaſes over the Land, and the Leſſee ſevers the Corn, he ſhall pay Tithes thereof to the Parſon; or if the Parſon having ſown his *Glebe* doth afterwards ſell the Corn, reſerving the Land, the Parſon, when the Vendee doth ſever the Corn, ſhall have the Tithe thereof, notwithſtanding his own Grant. 1 *Roll. Abr.* 655. *Glebe.* *Parſon ſows, and afterward Leaſes his Lands.*

So a Parſon ſows his *Glebe*, and dies before Severance, and another is inducted, and then his Executor, or his Vendee doth ſever the Corn, the Succeſſor ſhall have the Tithes: For though the Executor repreſents the Perſon of the Teſtator, yet he cannot repreſent him as Parſon, for that another is inducted. *Vide ibid.*

But if the Corn be ſevered, and the Parſon dies before it be carried off the Ground, there 'tis thought the Succeſſor ſhall not have the Tithes of the Corn ſo ſevered, tho' ſtanding in Rucks or Shocks on the Ground. For in the like Caſe the Executors of the dying Parſon, and not the Succeſſor, ſhall have the Tithes of all Corn within the Pariſh, which are ſevered from the Ground at the Time of the Parſon's Death; and this, tho' the Tithes were not then actually ſet out. For a Right to the Tithes was veſted in the dying Parſon, by the Severance of the Corn from the Ground: And ſo ſeems the Opinion in *Orphan's Legacy* 81. and *Office of Executor, chap.* 5. *fol.* 94. See alſo 2 *Bulſtr.* 184. 1 *Roll. Abr.* 656.

If a Spiritual Perſon hath a Parſonage appropriate, and enfeoffs another of Part of the *Glebe*, *Where he ſhall have or pay Tithes on his own Feoffment.*

Glebe, he ſhall yet have Tithes againſt his own Feoffment, 42 *E.* 3. 13. *a.* and if he demiſeth his *Glebe*, he ſhall have Tithes of his Leſſee. *Dyer* 43. But it is ſaid to be otherwiſe, if the Parſonage be impropriate and in Lay Hands, becauſe of the Stat. 32 *H.* 8. of Diſſolutions: *Brewer* and *Verſey*'s Caſe vouched by *Hutton* in *Noy* 132. *Quære* hereof; for the Court deny'd it, and ſaid it was adjudg'd the contrary in the Caſe of *Perkins* and *Hind* in Point. See *Booth* and *Franklin*'s Caſe, *Hetley* 31. And Note; If a Parſon lets his Rectory, reſerving to himſelf his *Glebe*, he in this Caſe ſhall pay Tithes to his Grantee. 37 *H.* 8. 35.

Leſſee, &c. to take Advantage of a Diſcharge.

If one contracts with the Parſon for the Diſcharge of the Tithes of his Lands for Years, and then demiſes his Lands to another, in this Caſe he ſhall not have Tithes of his Leſſee, for that this Contract for the Diſcharge is fixt to the Land, and the Leſſee and other Occupiers ſhall have the Advantage of it. But if one take a Leaſe of his Tithes by Deed, and then Demiſes his Land, in this Caſe he ſhall have Tithes of his Leſſee, for the Land was not diſcharged. See *Hetley* 31.

Tithe of the Parſon's Glebe *how payable, with reſpect to the Vicar.*

Altho' *Glebe* Land in it ſelf conſidered is Tithable as other Lands are, yet no Tithes ſhall be paid of the *Glebe* by the Parſon of a Church to the Vicar of the ſame Church, whilſt they are in the Hands of the Parſon himſelf, altho' the Vicar is endow'd of the Tithes of all Lands within the Pariſh. For the Rule is, *Eccleſia Decimas Eccleſiæ Solvere non Debet.* And *Tanfield* Baron then ſaid, that

that lately this Matter was in Queſtion between one *Young* and the Parſon of *Boxley* in the County of *Wilts*, and that 'twas then adjudg'd, That no Tithes ſhall be paid of the *Glebe* Lands in that Caſe. But by *Popham*, if the Vicar by Endowment be to have all the ſmall Tithes within the Pariſh, and then the Parſon makes a Leaſe of his *Glebe* Lands, the Leſſee ſhall pay the ſmall Tithes ariſing therefrom to the Vicar, and the Groſs Tithes thereof to the Leſſor: To which the Court agreed, 3 *Cro.* 479. and ſee *Moor* 457. S. C.

And ſo, if the Vicar had been eſpecially endowed of the Minute Tithes of *Glebe* Lands of the Parſonage, the Vicar ſhould have had them, altho' they were in the Hands of the Appropriator. But Note; it ought to be ancient *Glebe* at the Time of the Endowment. See 3 *Cro.* 578. and *Moor* 910. S. C.

How payable by the Vicar, with reſpect to the Parſon.

Alſo what is before ſaid of the Parſon's *Glebe*, with reſpect to the Vicar, will equally hold true as to the Vicar's *Glebe*, with reſpect to the Parſon; for whilſt the Vicar retains the *Glebe* in his own Hands, he ſhall not pay Tithe thereof; but if he Demiſe it to another, the Leſſee ſhall pay the Groſs Tithes to the Parſon, and the Vicar's Tithes to the Vicar. *Vide ibid.*

Alſo where the Vicar had ſowed his *Glebe*, and died, 'twas held, That the Tithes thereof ought to be pay'd by his Executors to the (ſucceeding) Vicar. *Q. Brownl.* and *Goldsbo.* 69. *ſed* 1 *Roll. Abr.* 655. *contr.*

But

Glebe, he ſhall yet have Tithes againſt his own Feoffment, 42 *E.* 3. 13. *a.* and if he demiſeth his *Glebe*, he ſhall have Tithes of his Leſſee. *Dyer* 43. But it is ſaid to be otherwiſe, if the Parſonage be impropriate and in Lay Hands, becauſe of the Stat. 32 *H.* 8. of Diſſolutions: *Brewer* and *Verſey*'s Caſe vouched by *Hutton* in *Noy* 132. *Quære* hereof; for the Court deny'd it, and ſaid it was adjudg'd the contrary in the Caſe of *Perkins* and *Hind* in Point. See *Booth* and *Franklin*'s Caſe, *Hetley* 31. And Note; If a Parſon lets his Rectory, reſerving to himſelf his *Glebe*, he in this Caſe ſhall pay Tithes to his Grantee. 37 *H.* 8. 35.

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If one contracts with the Parſon for the Diſcharge of the Tithes of his Lands for Years, and then demiſes his Lands to another, in this Caſe he ſhall not have Tithes of his Leſſee, for that this Contract for the Diſcharge is fixt to the Land, and the Leſſee and other Occupiers ſhall have the Advantage of it. But if one take a Leaſe of his Tithes by Deed, and then Demiſes his Land, in this Caſe he ſhall have Tithes of his Leſſee, for the Land was not diſcharged. See *Hetley* 31.

Tithe of the Parſon's Glebe *how payable, with reſpect to the Vicar.*

Altho' *Glebe* Land in it ſelf conſidered is Tithable as other Lands are, yet no Tithes ſhall be paid of the *Glebe* by the Parſon of a Church to the Vicar of the ſame Church, whilſt they are in the Hands of the Parſon himſelf, altho' the Vicar is endow'd of the Tithes of all Lands within the Pariſh. For the Rule is, *Eccleſia Decimas Eccleſiæ Solvere non Debet.* And *Tanfield* Baron then ſaid, that

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Alſo where the Vicar had ſowed his *Glebe*, and died, 'twas held, That the Tithes thereof ought to be pay'd by his Executors to the (ſucceeding) Vicar. *Q. Brownl.* and *Goldsbo.* 69. *ſed* 1 *Roll. Abr.* 655. *contr.*

But

Glebe *in another Pariſh.*

But it ſeems, if the Parſon's or Vicar's *Glebe* be in another Pariſh than where the Church is to which it belongs, the Tithes of ſuch *Glebe* ſhall be paid to the Incumbent of the Church where the *Glebe* is, unleſs the Parſon or Vicar, to whom ſuch *Glebe* belongs, can preſcribe in *non Decimando.* See *Moor* 522. 1 *Roll. Abr.* 653. *Selden* of Tithes, *fol.* 75, 76.

Unity of Poſſeſſion.

So if a Parſon or Vicar of a Church purchaſes a Manor or Lands within the ſame Pariſh, tho' by this Purchaſe and *Unity of Poſſeſſion*, the Lands which were Tithable before are now become Tith-free, becauſe a Man cannot pay Tithes to himſelf; yet if the Parſon leaſe his Rectory, the Parſon himſelf ſhall pay Tithes of his Land to his Leſſee, as before is ſhewn. *Vide ante.*

Alſo if a Parſon makes a Feoffment of his Manor or Lands, the Feoffee ſhall pay Tithes to the Feoffor, *i. e.* the Parſon; becauſe the Tithes are only ſuſpended, but cannot be extinguiſhed by any *Unity of Poſſeſſion.* See 30 & 32 *H.* 8. *Dier* 43. *Bro.* Tit. *Diſmes* 17. *Hetley* 31. and *ante.*

A. *ſells his Corn, and then becomes Proprietor of the Tithes.*

And the Caſe is ſtronger where a Man, being poſſeſs'd of Lands ſown with Corn, ſells the Corn to another, and afterwards becomes Proprietor of the Tithes of the ſame Lands; for in that Caſe he ſhall have the Tithes of the Corn ſo by him ſold; for though the Parſon may ſell the Tithes before Severance, and before the Severance hath ſuch an Intereſt and Right in them, as he may alien or diſpoſe of, ſo that his Property

perty in them doth not ariſe to him merely by the Severance, the Severance giving unto him only the Lay Intereſt in them; yet before Severance they ſhall not paſs without expreſs Words. See 2 *Bulſtr.* 183.

A Portion of Tithes ſeparate from the Rectory.

Altho', generally ſpeaking, the Tithes within every Pariſh do belong to the Rector, Vicar, or Impropriator of ſuch Pariſh, and ſhall be ſo intended, if the contrary is not ſhewn, as *Stile's Reg.* 623. yet may a Portion of Tithes within one Pariſh belong to the Rector, Vicar, or Impropriator of another Pariſh. See 4 *Co.* 35. *Godolph.* 35. 2 *Co.* 44. 14 *H.* 4. 17. 20 *H.* 6. 17. 44 *Aſs.* 25.

Portion of Tithes quid, & unde.

Note; By a Portion of Tithes, is to be underſtood where a Parſon, Rector or other, has ſome Part of Tithes of another Pariſh in Groſs, ſeparated and divided from the Rectory of the Pariſh wherein they ariſe. And it is ſaid, That the Original of theſe Portions is to be referred to the Time antecedent to the Council of *Lateran*, when it was lawful for every Man to diſpoſe of his Tithes to any Church he pleaſed, and was not reſtrained to pay them to any one Pariſh or Parſon in particular. See the Books cited *ſupra*, and 8 *E.* 4. 14. 13 *Co.* 13.

But notwithſtanding theſe Authorities, Mr. *Watſon*, and ſome others, think it probable, That many of theſe Portions of Tithes have had their Commencement by the Grants of Parſon, Patron, and Ordinary, ſince the ſaid Council of *Lateran.*

However that be, 'tis certain, a Portion of Tithes is, in the Notion of the Law, ſo diſtinguiſhed from Tithes belonging to a Rectory,

Rectory, That if a Portion of Tithes in ſuch a Pariſh be granted (eſpecially in Caſe of the King's Grants) Tithes belonging to the Rectory will not paſs thereby. See 4 *Co.* 35. *Clayton*'s *Rep. Caſe* 25. and ſo in pleading, if Tithes be demanded generally, a Portion of Tithes ſhall not be recovered by ſuch a Demand, as may be collected from the Caſe 14 *H.* 4. 17.

Perſons diſcharged of Tithes.

It is generally admitted, That at Common Law, not only Spiritual Perſons, but *Perſonæ mixtæ*, as the King or Queen, might be diſcharged from the Payment of Tithes. And therefore the King might preſcribe to be abſolutely diſcharged from Payment of Tithes. See 22 *Aſs.* 75. *Fitz. aid del Roy* 103. 10 *H.* 7. 18. *Moor* 483. and 1 *Jon.* 387. And 'tis ſaid to be a Rule, That he who may have Tithes may be diſcharged from the Payment of them. 1 *Brownl.* and *Goldsbo. p.* 31. (*Sed Quære.* For then all Laymen may be diſcharged from paying Tithes; for they are now capable of having them by Grant or otherwiſe, as before is ſhewn). And therefore it is, That Lands lying within a Foreſt, and in the Hands of the King, do not pay Tithes, altho' they be within a Pariſh. See *Stile*'s *Rep.* 137. *Stile*'s *Reg.* 624. *Hetly* 60.

Foreſt Lands.

The King's Leſſee, &c.

And note; This Privilege extends to the King's Leſſee, but not to his Feoffee; by *Henden*, *Davenport* and *Athow*, Serjeants. *Hetley* 60. and *per Curiam. Stile* 137. 1 *Jon.* 387. But if the Lands be diſafforeſted, and be within any Pariſh, then they ought to pay

Pay Tithes in the Hands of the King's Leſſee, &c. See *Stile* 137.

But the Tithes of Lands, which are not within any Pariſh, do of Right belong to the King. And there are ſaid to be divers Foreſts which are not within any Pariſh. See 22 *Aſs.* 75. 2 *Inſt.* 646. 1 *Roll. Rep.* 454. 457. *Stile* 137. and *Selden* of Tithes 365, &c. *Extraparochial.*

Yet 7 *Ed.* 3. 5. *a.* The Opinion of *Herle* ſeems to the contrary, *viz.* That ſuch Extraparochial Tithes belong to the Biſhop; but that is to be underſtood by the Canon, and not by the Common Law; and that Canon, which gave the Extraparochial Tithes to the Biſhop, was never allowed or received in this Realm. 2 *Inſt.* 467.

But as to the Tithe of Cattle kept or depaſtured on Waſtes or Commons where the Pariſh is not known, this is given to the Parſon of the Pariſh, where the Owner of ſuch Cattle doth inhabit, by the Statute 2 & 3 *Ed.* 6. *cap.* 13. *Sect.* 3. as before is obſerved. *Stat.* 2 & 3 Ed. 6.

It is ſaid to be ruled by the Advice of all the Judges, upon a Caſe depending in the Exchequer, 29 *Eliz.* That although the Queen ſhall not pay Tithes for her own Poſſeſſions, becauſe ſhe is *Perſona mixta*, and ſo may well retain them; yet if ſhe grants them by Patent in Fee, her Patentee ſhall pay Tithes; and that ſo ſhall her Copyholder of Inheritance, for that they cannot Participate of the Queen's Prerogative therein. 3 *Cro.* 785. *King's Patentee or Copyholder in Fee.*

His Tenant in Capite.

It is alſo admitted, That Lands held of the King *in Capite*, paid Tithes. 3 *Cro.* 393. *Hardr.* 315, But a Suit for the Subſtraction of ſuch Tithes was to be in the Chancery, and not in the Spiritual Court. *F. N. B.* 40. *Selden of Tithes* 354.

Chancery.

King's Farmer.

Yet in *Foſſet* and *Franklin*'s Caſe, 25 *Car.* 2. *B. R.* it was agreed, That the King's Farmer ſhall be diſcharged of Tithes, though the Diſcharge be only *in propriis Manibus.*

And Sir *William Jones* ſaid it had been ſo adjudged. (*Vide ante*). But the Court at that Time did not remember it, and held the King's Fee-Farmer was not diſcharged; no more is his Leſſee coming in under the Privilege of the Monaſtery.

But they agreed that the King as a Spiritual Perſon, may preſcribe in Diſcharge of himſelf and Farmers; but by a general Preſcription the King's Farmers are not diſcharged, much leſs on a Diſcharge by Privilege of Order, *&c.* And the Court conceived the Preſcription muſt be alledged, and found for the King, his Farmers and Tenants; and that Nonpayment by the under Tenants of the King's Farmer, is ſufficient Evidence to prove ſuch Preſcription. See 3 *Keeb.* 208, 217. *Raym.* 225.

And note; though Perſons meerly Spiritual or Mix'd, as the King, *&c.* might at the Common Law, preſcribe to be diſcharg'd of Tithes *in non Decimando*, *ut ſupra*; yet it is ſaid, that no Layman could ſo preſcribe, without the Aid of an Act of Parliament.

But now, by Virtue of the Stat. 27 *H.* 8. *c.* 28. & 31 *H.* 8. *c.* 13. Both the King and his

his Patentees, and other Owners of Abby Lands are to hold them diſcharged from the Payment of Tithes, as freely as the Abbots, *&c.* themſelves did.

Alſo it has been adjudged, That whilſt the King's Title to ſuch Lands remains, and they be manured by his Farmers or Tenants, for Years or at Will, no Tithes are to be paid for them, although Tithes ſhould have been paid of them by the Farmers or Tenants of the Abbots or Priors that held them, before that Statute. And the Reaſon given is, That the King himſelf cannot manure them, *&c.* But it is ſaid, if the King having leaſed them, grants over the Reverſion, or ſells them, there the Farmers ſhall pay Tithes; by *Manwood*, Ch. Baron. 2 *Leon.* 71. and *Owen* 56. S. C.

But in another Caſe *Tanfield*, Ch. Baron, ſaid, That the King's Tenant for Life or Years ſhall not be free from Tithes, but only his Tenants at Will; and it was there agreed *per Curiam*, That the King's Patentee is to be intended of the King's Farmers, and not his Patentees in Fee. *Moor* 215. And ſo in the Caſe of the Foreſt of *Savernacle*, *ſupra*, it was agreed, That the King's Patentee ſhall pay Tithes: And ſo in *Bowle*'s and *Atkin*'s Caſe. 2 *Keb.* 29.

Preſcription deſtroyed.

And in the Caſe of *Compoſt* v.—*Hardr.* 315. it is ſaid, That if the King alien any of the Lands whereof he is diſcharged of Tithes, his Patentee ſhall pay Tithes, and not only ſo, but the Preſcription to be diſcharged of Tithes is deſtroyed for ever, tho' the ſame Lands ſhould afterwards come again to the King's

King's Hands by Eſcheat or otherwiſe: However, the Reverſioner, and the King's Patentee, and their Aſſignes ſhall have the ſame Privilege that the Abbot had, *viz.* To hold them free whilſt in his own Hands, and not let to, or manured by another. See *Benl. Rep.* 143.

And yet methinks ſuch of the foregoing Caſes, as are reſtrictive of the King's Authority, do not purſue the Intent of the ſaid Statutes, which veſted thoſe Lands as freely in the King as they were in the Hands of the former Poſſeſſors, who we know claimed an Exemption and Diſcharge from the Payment of all Tithes; and this merely from the Authority of the Pope's Bull, *&c.* And ſince all Eccleſiaſtical Authority and Juriſdiction is now lodg'd in the Perſon of the King, as fully and abſolutely as it poſſibly could be in the Pope. I See no Reaſon why the King cannot now grant Lands to be free from the Payment of Tithes, as well as the Pope could formerly. And this I take to be made more clear by the Stat. 1 *Ed.* 6. *c.* 14. which Enacts, That all Colleges, Chanteries, *&c.* and their Lands, Tenements, Tithes, *&c.* ſhall be in the actual and real Poſſeſſion of the King, his Heirs, *&c.* for ever.

Vide poſt, *Chap.* 7. *page* 282, 283, &c.

And accordingly, in the Caſe of *Whitton* and *Weſton*, upon the Queſtion whether the Privilege of being diſcharged of Tithes was preſerved and given to the King and his Patentees; tho' at firſt the Court was in ſome Doubt, as *Bridgman* 33. *Latch* 89. *Goldsbo.* 395. yet afterwards on ſolemn Debate and Argument,

Argument, as 1 *Jon.* 181 *to* 191. It was reſolved by three Judges againſt one, That it was the Right both of the King and his Patentee to be diſcharged of Tithes. (*Q.* 2 *Bro.* 8. 23. *Cro. Jac.* 57. *Moor* 913. 2 *Co.* 49.)

Alſo in the Caſe of *Foſſet* and *Franklin*, which ſee before and in *Raym.* 225. and 3 *Keb.* 208. it was adjudg'd upon a ſpecial Verdict, that ſuch Lands are (entirely) diſcharged from the Payment of Tithes.

I ſhall no further enlarge, in this Place, on the two former Points, *viz.* by whom Tithes are to be paid, or to whom they are payable; but proceed to the third Diviſion of this Chapter, and in general ſhew in what Manner they ought to be Paid.

The Manner of Payment.

And here in the firſt Place we are to note, That the *Modus Solvendi*, or Manner of paying Tithes, is entirely to be guided by the Cuſtom of the Place where they ariſe, as before we have ſhewn in ſeveral Inſtances.

To be guided by Cuſtom.

It is further obſervable, That the ſeveral Statutes which direct the Payment of Tithes do alſo direct the Manner of Payment to be according to the Cuſtom of the Place. *Vide ant.* Chap. 2, 3 and 4 *Moor* 913. 2 *Leon.* 70. 1 *Roll. Rep.* 172, 420. 1 *Roll. Abr.* 643, *&c.*

Q. Watſ. 488.

Thus the Stat. 27 *H.* 7. *cap.* 20, *& cap.* 21. do continue the Cuſtoms of *London* in the Payment of their Tithes. See alſo Stat. 37 *H.* 8. *c.* 12.

Thus the Stat. 32 *H.* 8. *cap.* 7. Entitled an *Act for the true Payment of Tithes and Offerings*, in its ſecond Section does enact, That every Perſon ſhall ſet out and pay his Tithes according to the Cuſtoms and Uſages

of the Pariſhes and Places where they are due.

Thus the Stat. 2 & 3 *E.* 6. *c.* 13 not only confirms both the ſaid former Statutes, but further provides and enacts, 'That the ſaid 'Act, nor any Thing therein contained, 'ſhall not extend in any-wiſe to the Inhabitants of the Cities of *London* or *Canterbury*, and Suburbs of the ſame, nor to any 'other Town or Place that hath uſed to 'pay their Tithes by their Houſes, otherwiſe 'than they ought or ſhould have done before the making of that Act, any thing 'therein contained to the contrary, *&c.*

Stat. 2 & 3 *Ed.* 6. *c.* 13.]

So Sect. 1. of the ſame Act directs Predial Tithes to be paid as within forty Years paſt they had been. So Sect. 5 and 6. The Improver of Barren Land to pay for ſeven Years only what was uſual; Sect. 7. and 8. That Handicrafts pay according to the Cuſtom uſed for forty Years paſt; Sect. 10. That Offerings be only pay'd as accuſtom'd, and Sect. 11. Tithe Fiſh to be paid only as uſual, *&c.* See the Stat. 32 *H.* 8. and 2 & 3 *E.* 6. hereafter, Chap. 7.

Cuſtom of Tithing of two Kinds.

Now this Cuſtom of Pariſhes or Places, in the Caſe of Tithes, chiefly conſiſts of two Kinds, *viz.*

1. Where there is by Cuſtom a *Modus Decimandi*, *i. e.* a Cuſtom to pay either Money, or ſome other Thing in Lieu of Tithes in Kind; See of this hereafter.

Things not Tithable in their Nature, See Degg 267. *and* 1 Roll. Abr. 642.

2. Where Tithe has by Cuſtom been pay'd of Things that in their Kind or Nature are not Tithable, as Tithes of Things *Feræ Naturæ*, in ſome Places: So the Tithes of

of Lead in *Derbyſhire*, or of Tin in *Devonſhire* or *Cornwall*.

So the Cuſtom of paying the Tithe of Fiſh, or for fiſhing in the Sea, *&c.* as in ſome Parts of *South-Wales*, where 'tis ſaid the Cuſtom is, That if the Pariſhioner of one Pariſh lands his Fiſh in another, the Tithes are divided between the Parſon of the Pariſh where the Fiſher lives, and the other where he lands his Fiſh: But if the Pariſhioner lands his Fiſh in the ſame Pariſh where he dwells, there the Rector or Parſon of that Pariſh ſhall have the whole Tithe.

And in ſome Places they pay Tithe of Lime-kilns by Cuſtom, and ſo of other Things, which in their own Nature are not Tithable: And note; in theſe, and other like Caſes, the Tithe taken is ſaid to be a Tithe againſt Common Right, and therefore ſuch Cuſtoms ought to have ſome Colour or Ground of Reaſon for their Suport; and therefore *Quære* the Reaſonableneſs of the Cuſtom of Tithe of Ale, which is ſaid to be at *Market-raiſin*, and other Parts of *Lincolnſhire*; for unleſs it be in Lieu of ſomething which is there exempted from Tithe, or ſome other Conſideration, I cannot conceive the Cuſtom to be good. 1 Roll. Abr. 642.

And as by Cuſtom there may be a *Modus Decimandi*, or one Thing pay'd for Tithes in Satisfaction and Diſcharge of another; and Things may be made Tithable in Kind, which in their own Nature are not ſo; ſo Cuſtom has a great Influence upon the Form and the Manner of Tithing, and in many Places and Caſes directs the Time, the Place, and the Order or Method of Payment. Modus Decimandi.

De non Decimando *where good.*

And as Cuſtom may make Things Tithe-able, which of their own Nature are not Tithable; ſo the Cuſtom of a Country, Province or Hundred, may Diſcharge the Payment of Tithes for Things, which in their own Nature are Tithable; ſo that there be a Competency for the Maintenance of the Miniſter beſides. And ſo it was adjudged in the Caſe of *Hicks* and *Woodſon. Mich.* 6 *W. M. B. R.* See 4 *Mod.* 336, 340. *Cumb.* 403. 2 *Salk.* 655. *Skin.* 560.

So a Cuſtom to be exempted from the Tithe of Underwood, uſed within a Pariſh for Fencing of Corn, is good; but it is ſaid you muſt ſhew, that the Tithes of the Corn are paid by you to the Parſon. See 4 *Mod.* 341, 342, *&c.*

And yet it has been adjudg'd, that Tithe-Wood is not due of Common Right, but payable only as a Cuſtomary Tithe; and ſo of Mills, *&c. Cumberb.* 404. *Vide ante.*

The Wilds of Kent, *&c.*

And note; the Cuſtom of the *Wilds of Kent* and *Suſſex*, is to be free from the Payment of Tithe-Wood, or any Thing in Lieu of it. See *Hob.* 266. 2 *Bulſt.* 245.

And ſo in ſeveral Countries they pay no Tithe of their Milk. *Quære* if they are alſo diſcharged of the Tithe of Cheeſe; and ſee *Dr. & Stud. cap. ult.* 1 *Roll. Abr.* 642. *B.* 1. and *P.* 5, 6 & 8.

So Tithe-Fiſh are not due of Common Right, but only by Cuſtom. 6 *Mod.* 223. 1 *Lev.* 179.

And where Tithes are due of Common Right, and where by Cuſtom; ſee 4 *Mod.* 341, 344.

But

But it is laid down as a general Rule, that a Country or Hundred cannot preſcribe *in non Deuimando*, for Things Tithable of Common Right; but otherwiſe it is of Things not Tithable of Common Right. *Salk.* 655. 4 *Mod.* 336.

Difference between Cuſtom and Preſcription.

But there ſeems to be a Difference between Cuſtom and Preſcription. For tho' a Layman cannot preſcribe *in non Decimando*, yet a Cuſtom may excuſe a Layman from the Payment of Tithes. See 4 *Mod.* 341.

Alſo a Layman may preſcribe to have Tithes. See 2 *Mod.* 320, 321.

And ſo in the Caſe of *Payne* verſ. *Brigham*, in *Lutwich's Rep. Mich.* 36, 37. *Car.* 2. & 1 *Jac.* 2. it was adjudged, that a Layman may well alledge a Seiſin in Fee of Tithes: But that he could not entitle himſelf thereto without ſhewing how.

So in an Action on the Statute 1, 2 *Ed.* 6 for not ſetting out Tithes, it is ſufficient to declare, That he was *Proprietarius*, without ſhewing a Title; but he cannot recover without proving it, *ut dicitur.* 4 *Mod.* 422.

Cuſtom deſcribed, &c.

Now the preciſe Difference between a Cuſtom and Preſcription (though they often ſeem to be confounded in our Books) is this, *viz.*

Every Cuſtom is local, and muſt have ſome certain Dimenſion of Place to exiſt in: And therefore in pleading, *&c.* muſt be alledged to be within ſome certain Province, Country, Hundred, City, *&c.* in particular; for if it be a general Cuſtom through the Kingdom, it is Common Law. And ſuch Cuſtom muſt be common to all

within ſuch Limits. But if it be confined to any Perſon or Perſons certain, or to a Houſe, Land or other Thing, there it becomes a Preſcription, which is a younger Daughter to Cuſtom.

Of pleading a Cuſtom,

And therefore the Manner of pleading a Cuſtom is to alledge, that within ſuch a Country, Hundred, or Town there is, and from the Time whereof the Memory of Man is not to the contrary, there hath been ſuch a Cuſtom uſed and approved in the ſame, that is to ſay, That, *&c.* and ſo ſetting forth the Cuſtom as it is.

and Preſcription.

But when you plead a Preſcription, you only alledge, that you and all thoſe whoſe Eſtate you have in ſuch and ſuch Lands, have, Time out of Mind, paid ſo much annually to the Parſon of *D.* in full Satisfaction, Exoneration, and Diſcharge of all the Tithes ariſing upon the ſaid Lands, *&c.*

From whence it appears, That, ſtrictly ſpeaking, Cuſtom and Preſcription differ in theſe Particulars. 1. Cuſtom is local, and muſt be limited and confined to ſome certain Place; Preſcription is at large, and not confined to a Place. 2. Cuſtom is common to all the Perſons and Lands within the Limits where it is alledged, but Preſcription is only applicable to certain Perſons or Things.

Wherein they agree.

But yet in this they both agree, *viz.* they muſt be conſtant without Interruption, and perpetual from the Time whereof the Memory of Man is not to the contrary; for if there hath been frequent Interruptions, there can be no Cuſtom or Preſcription

tion obtained; but after a Cuſtom or Preſcription is once duly obtain'd, a Diſturbance or Interruption for ten or twenty Years ſhall not deſtroy it. For *multiplex Interruptio non tollit Præſcriptionem ſemel obtentam.* 1 Inſt. 114. 2 Inſt. 653, 654.

Time of Preſcription.

But here we may obſerve, that though the Civil and Canon Law do in ſome Caſes take Notice of Cuſtom and Preſciption, yet herein they differ from the Common Law; for they allow a Uſage for forty Years to be a good Cuſtom or Preſcription, founding their Judgment upon a Decretal Epiſtle of Pope *Alexander* the Third, *Anno* 1180. But this Kingdom never allowed of that Epiſtle, or yielded any Obedience to it. And therefore all Cuſtoms and Preſcriptions, as well Spiritual as Temporal, if ever they come to be tried at the Common Law, as all (Cuſtoms and) Preſcriptions concerning Tithes, (if they are controverted) ought, muſt be proved to have been uſed beyond the Memory of Man to the contrary. For if any Man living, or any Authentic Record or other Evidence, prove it was otherwiſe at any Time ſince the firſt Year of King *Rich.* 1. *i. e. Anno* 1189. the Cuſtom or Preſcription muſt fail. See 2 *Inſt.* 653.

How proved.

And we may further obſerve, that both Cuſtom and Preſcription, with Reſpect to Tithes, may be either *de modo Decimandi*, or *de non Decimando*; as to Cuſtoms and Preſcriptions *de modo Decimandi*, none at this Day do diſpute; and it has been alſo frequently adjudg'd, that a Cuſtom *de non Decimando*

cimando may be good, either in Reſpect of this or that particular Place or Land, (as Lands diſcharged by Statute, *&c.*) or in Reſpect of this or that particular Tithe; ſo that a County, or Part of a County, as a Hundred, Town, *&c.* ſhall not pay any ſuch Sort of Tithes, as Wood, or the like, provided there be a ſufficient Maintenance for the Miniſter as aforeſaid. See 1 *Roll. Abr.* 653, 654, *& ante.*

Bakers free of Tithe of Mills.

And upon this Reaſon ſeems the Caſe to be adjudged, that a Cuſtom for Bakers, within two Hundreds, not to pay any thing for Tithes of new erected Mills, for the Uſe of their Trade, *&c.* was a good Cuſtom. 1 *Roll. Abr.* 654. But ſuch Cuſtom is ſaid not to be good for a ſingle Pariſh; nor indeed can any Pariſh properly preſcribe, or claim by Cuſtom, ſeeing Pariſhes were erected within Time of Memory.

Milk of Ewes.

So on the like Reaſon, where one was ſu'd in the Eccleſiaſtical Court for the Tithe-Milk of Ewes, he ſuggeſted for a Prohibition, that, by the Cuſtom of the Country, no Tithes of the Milk of Ewes had been paid within the Memory of Man, and a Prohibition was granted thereupon. See 1 *Roll. Abr.* 654.

Underwood.

It has been alſo adjudg'd, that no Tithes of Underwood ſhall be paid in forty Pariſhes within the *Wild of Suſſex*, nor in all the *Wild of Kent. Ibid.* 653, 654. And the like Preſcription has been allowed in other Particulars, as before is, and hereafter will be ſhewn.

But further, To ſhew what Influence Cuſtom and Preſcription have in the Caſe of Tithes, and the Manner of Tithing, let us conſider the ſeveral Statutes that allow and approve the ſame.

And firſt, by the Statute 27 *H.* 8. beforementioned it is Enacted, *That every Subject of* England, &c. *according to the Eccleſiaſtical Laws and Ordinances of the Church of* England, *and after the* laudable Uſages and Cuſtoms *of the Pariſh or other Place, where he dwelleth, or occupieth, ſhall yield and pay his Tithes, Offerings, and other Duties of Holy Church*, &c. *Stat.* 27 H. 8

By this Statute the legal Eccleſiaſtical Canons and Conſtitutions are affirmed, as to the Payment of Tithes; but in ſuch Caſes where they are contrary to the Common Law, or Cuſtoms of the Place, they do not bind. And in the next Place, this Act allows and confirms all Uſages and Cuſtoms of the Place where the Tithes ariſe, which are to be preferred before all Eccleſiaſtical Canons and Conſtitutions in the Manner of Tithing.

The next Statute is that of 32 *H.* 8. *c.* 7. whereby it is Enacted, *That every Perſon*, &c. *ſhall fully, truly and effectually* ſet out, yield, and pay *all and ſingular Tithes and Offerings aforeſaid, according to the* lawful Cuſtoms and Uſages *of the Pariſhes and Places where ſuch Tithes or Duties ſhall grow, ariſe, come or be due.* *Stat.* 32 H. 8.

This Act alſo confirms the lawful Cuſtoms and Uſages in the Caſe of Tithes, &c. And ſo doth

The

Stat. 1 & 2 Ed. 6.

Of Dividing, Setting out, Paying.

The Stat. 1, 2 *Ed.* 6. *c.* 13. which Enacts, *That every of the King's Subjects, ſhall from henceforth,* truly and juſtly, *without Fraud or Covin,* Divide, ſet out, yield and pay *all manner of their predial Tithes in their proper Kind, as they ariſe and happen, in ſuch* Manner *and* Form *as hath been of Right yielded and pay'd within forty Years next before the making of the ſaid Act, or of* Right or Cuſtom *ought to have been paid.*

Note; This Act extends only to Predial Tithes, and in general ſeems to intimate three Things in the dividing, ſetting out, and Payment of Tithes.

1. Such Predial Tithes as of Right ought to be paid: And,
2. Such, as by Cuſtom ought to be paid, are to be divided, ſet out, and yielded.
3. The Manner and Form of Payment to be as of Right had been within forty Years precedent.

Upon this Branch of the ſaid Statute, as relative to that of 31 *H.* 8. it is, That if an Abbot or Prior were ſeized of Lands diſcharged of Tithes, he that is now Farmer or Tenant of ſuch Land, ſhall be admitted to preſcribe *in non Decimando.* See *Moor* 219. & *poſt.*

Taking and carrying away of Tithes.

Alſo by the ſame Statute, 'tis further Enacted, *That at the Tithing Time of predial Tithes it ſhall be lawful for every Party to whom any (ſuch) Tithes ought to be paid* (i. e. *either Layman or Clergyman*) *or his Deputy or Servant, to come upon the Lands, and*

ſee

ſee the ſaid Tithes ſet forth and ſevered from the nine Parts, and the ſame Quietly to take and carry away.

And Note; this Branch or Clauſe of the ſaid Act, as to the taking and carrying away, ſeems only Declarative of the Common Law; but as to the coming upon the Lands to ſee the ſame ſet out, it ſeems to be a new Authority given by this Law; for the Owners of the Land are *de jure* bound to ſet forth their Tithes duly and rightly; and if they fail therein, the Parſon, Vicar, *&c.* hath his Remedy, by Action on the Caſe, or otherwiſe. See 2 *Roll. Abr.* 302. N°. 19. *Setting them forth.*

But if the Pariſhioner do duly and truly ſet forth his Tithes, although the Parſon, Vicar, *&c.* be not preſent, or have no Notice given him to be preſent at the ſetting forth of the Tithes; yet this, before this Statute, had been a good ſetting forth. And ſo it is ſince the making of the Statute, for thereby it is only lawful for the Parſon, *&c.* to come on the Land to ſee them ſet forth, but he is bound to take Notice of the Time at his Peril. See *Spencer*'s Caſe in *Noy*'s *Reports*. 2 *Ventris* 48. 1 *Roll. Abr.* 643. *X.* 1. *Parſon, &c. to take Notice thereof.* *Vide poſt.* 192.

And if a Pariſhioner ſets forth his Tithes, and ſevers the Tenth from the nine Parts juſtly and truly, though he does not give either a perſonal Notice to the Parſon, or a general Notice in the Church, of the Time of ſetting them out, ſo as the Parſon may be preſent thereat, and ſee that it be juſtly done; yet this is a good ſetting out, *&c.*

as

as was adjudged on Writ of Error. See 2 *Danv.* 595.

Yet it muſt be acknowledged to be a fair and juſt Way, not only to give the Parſon, *&c.* Notice of the Time intended, but alſo, if conveniently it may be, to ſet them forth in the Preſence of him or his Deputy.

And to come only by himſelf or Deputy.

And note; this Clauſe is warily penn'd in the ſingular Number, impowering only the Parſon himſelf or his Deputy, or Servant, to come upon the Land to ſee the Tithe ſet forth; but he muſt not come with a greater Number. See *Degg* 272.

But cannot ſet them forth without leave.

Alſo the Parſon, Vicar, Impropriator or Farmer cannot come himſelf and ſet forth the Tithes without the Licenſe and Conſent of the Owner of the Corn, Graſs, Hay, *&c.* For if the Parſon, Vicar, *&c.* ſhall of his own Head tithe the Corn, Graſs, Hay, *&c.* of any Landholder within his Pariſh, *&c.* and thereupon carry it away, he is a Treſpaſſer, and an Action will lie againſt him for it. See 1 *Jon.* 90.

Licenſe not good.

Note; it was found upon a ſpecial Verdict, That *A.* a Parſon had made *B.* his Deputy, or Collector of the Tithes within his Pariſh, and that *B.* the Deputy had licenſed the Owner to carry away his Corn without ſetting forth of the Tithes: But the Court held clearly, that the Licenſe was void. See *Plowd.* 104. and *Noy*, in the Caſe of *Brickendine*, &c. *pag.* 134. See *ib.* 126, 152. 2 *Inſt.* 649.

Frudulent ſetting forth.

A Pariſhioner privately ſets forth his Tithes, and takes Witneſſes of it, but immediately afterwards carries the Tithes with the

the reſt of the Corn, *&c.* away; adjudg'd, This was not a ſetting forth within the Statute; for the Words thereof are, *truly and juſtly, without Fraud or Guile*; one *Baker's* Caſe. See *Rep. Canon* 381. *Noy* 126, 152. 2 *Leon.* 101. 1 *Brownl.* 34.

So if a Pariſhioner ſells his Corn or Grain upon the Lands, and afterwards the Vendee by Command of the Vendor, takes away the Corn, *&c.* being ſevered, without ſetting forth the Tithes, the Parſon may well have an Action againſt the Vendor upon this Statute, and ſhall not be compelled to ſue the Vendee, who, it may be, is not known to him; and the ſetting forth is not Traverſable. *Ibid.* See *Noy* 152. *Brownl.* 34. 2 *Inſt.* 649. *Taken by Vendee.*

But if the Tithes in ſuch Caſe be once duly ſevered, and after taken away by a Stranger, the Parſon cannot Sue the Owner, but may Sue ſuch Stranger at the Common Law only. See 3 *Keeb.* 846. *Moor* 912. 3 *Cro.* 607. 4 *Leonard* 7. 1 *Sid.* 92.

Alſo, if two Parſons have Portions of Tithes by Halves in one and the ſame Pariſh, this Statute does not oblige the Pariſhioner to divide the Tithes by Halves, or to ſet out the ſeveral Parts ſingly; but ought only to divide and ſet out the Tenth entirely; and the two Parſons are to come and divide ſuch Tenth between themſelves, according to their ſeveral Rights; and ſo it was adjudged when five Perſons joined in an Action of Debt, upon this Statute. See *Latch* 228. *Tithes by Moieties.*

So,

as was adjudged on Writ of Error. See 2 *Danv.* 595.

Yet it muſt be acknowledged to be a fair and juſt Way, not only to give the Parſon, *&c.* Notice of the Time intended, but alſo, if conveniently it may be, to ſet them forth in the Preſence of him or his Deputy.

And to come only by himſelf or Deputy.

And note; this Clauſe is warily penn'd in the ſingular Number, impowering only the Parſon himſelf or his Deputy, or Servant, to come upon the Land to ſee the Tithe ſet forth; but he muſt not come with a greater Number. See *Degg* 272.

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So,

To be reap'd, cut, &c.

So, tho' a Parishioner be bound *De Jure* to reap or cut his Corn, Hay, *&c.* and further by this Statute, to set forth the Tithes; yet having duly set them forth, he is not bound to watch or guard them from being Stollen or Eaten; but the Parson is bound to take care of them, and to carry them away in convenient Time; For, if through his Neglect to carry them away, the Tithes are eaten or lost, he shall not have Tithes again: And if in such Case he Sues the Parishioner who has once duly set them forth in the Spiritual Court, and the Parishioner offers the special Matter by Way of Plea there, and they refuse to allow of such Plea, a Prohibition lies. See *Noy* 31. 2 *Leon.* 101.

The Parson, after set out, to take care of it,

The Parson of *A.* libell'd for Tithes of Hay, *&c.* and therein alledged, That the Custom of the Parish hath been, *&c.* That he who has Corn within the Parish ought to reap the same, and also the Tithes of the Parson, and to make them into Cocks, and to preserve them until the Parson shall carry them away; and a Prohibition was granted; for tho' the Parishioner ought *de Jure* to reap the Tithe Corn, as has been often adjudged, yet he is not bound to put up in Cocks, much less to guard the Parson's Tithes. See *Noy*, Dr. *Bridgeman*'s Case.

and carry it away in Time.

Also, if the Parson does not carry the Tithes away in convenient Time, an Action on the Case (or it seems Trespass, *sed Quære*) will lie against him. See 1 *Roll. Abr.* 643. *X.* 2. 2 *Danv.* And herewith agrees Dr. *Bridgeman*'s Case in *Noy*, where such an Action

Action was brought by one *Wiſeman* againſt the Rector of *Landen* in *Eſſex*, for not accepting, or taking away the Tithe of Cheeſe, and as it ſeems in that Caſe, without any ſpecial Damage ſhewn.

Or Action lies.

And yet in the Caſe of *Sleman* and *Chanor* in *Latch's Reports*, the contrary ſeems to be held, *viz.* That the Action againſt the Parſon for not taking away his Tithes, will not lie, without ſhewing the ſpecial Damage. That Caſe was thus,

On Damage ſhewn.

The Owner of the Corn had duly ſet out his Tithes, but the Owner of the Land took them as Damage Feaſant; but in the Declaration 'twas not ſhewn how long the Corn remained on the Ground; and the uſual Courſe is, That, if Tithe be ſet out, and the Parſon take it not away in due Time, the Party ſhall have an Action on the Caſe. And by the Court a Man cannot diſtrain Shocks of Corn, but he may diſtrain a Stack Damage Feaſant: But ſay they, in this Caſe it is not ſhewn how long the Corn remained on the Ground; and therefore it does not appear that he was damnified. See *Stile* 342, 348. and *Hughe's Abr.* 329.

Notice where neceſſary.

And 'tis ſaid, That no Action will lie againſt the Parſon, Vicar, *&c.* in that Caſe, unleſs the Pariſhioner has duly ſet forth his Tithe, and given Notice thereof to the Parſon, *&c.* See *Degg* 273.

So by the Parſon, if taken away.

After the Tithes are duly ſet out, the Parſon may, by the ſaid Statute, have an Action of Treſpaſs, if any take them away; but if only a Stranger ſets them out, that ſettles no Property in the Parſon, ſo as he cannot

cannot in that Caſe have an Action for taking them away. See *Stileman's* Caſe in *Latch.*

Yet *Quære* if ſuch ſetting out by a Stranger may not be with a fraudulent Intent; for in ſuch Caſe I conceive an Action will lie againſt him in whom the Fraud is.

How to be carried away.

Alſo the Parſon, Vicar, *&c.* may carry his Tithes from the Ground where they grew, either by the Common Way, or by any other Way, which the Owner of the Land uſes when he takes away the nine Parts. See 1 *Roll. Abr.* 643. *X.* 3.

Ways ſtopp'd, &c. an Action lies, &c.

And if the Owner of the Soil, (or Corn, *&c.*) after he has duly ſet forth his Tithes, will ſtop up the Ways, and not ſuffer the Parſon, *&c.* to carry away his Tithes, or will not permit him to ſpread, dry, and ſtack the Tithes upon the Land; this is no good ſetting forth of the Tithes, without Fraud, *&c.* within the ſaid Statute.

And in ſuch Caſe I conceive, the Parſon, *&c.* or other Owner, or Farmer of the Tithes, may have an Action upon the ſaid Statute, and recover the treble Value, or he may have an Action of the Caſe for ſuch Diſturbance, or he may break open the Gate, Fence, *&c.* which hinders him; but in ſuch Caſe he muſt be cautious that he commit no Riot, nor break any Gate, Rails, Lock, Hedge, *&c.* more than is neceſſary for his Paſſage. See 1 *Bulſtr.* 108.

Alſo the Parſon when he comes with his Wains, Carts, Teams, or other Carriages, to carry away his Tithes, muſt not ſuffer his Horſes, Oxen, *&c.* to eat and depaſture

the Graſs growing in the Grounds where the Tithes ariſe; much leſs the Corn there growing or cut; but if his Cattle (as it cannot well be avoided) ſhall in their Paſſage, againſt the Will of the Drivers, here and there ſnatch and eat ſome of the Graſs, *&c.* this ſurely is excuſable, becauſe involuntary.

Alſo Note, that a Parſon, Vicar, *&c.* may *de Communi Jure*, after the Tithes are ſet forth, come upon the Land himſelf, and with his Servants, and there ſpread abroad, dry, and ſtack his Corn, Hay, *&c.* in any convenient Place or Places, upon the Ground where the ſame grew, till they are ſufficiently weathered, and fit to be carried into the Barn, *&c.* (But he muſt not take a longer Time for the doing thereof, than is convenient and neceſſary.) 1 *Roll. Abr.* 643. *X.* 2. and 3. 1 *Roll. Rep.* 220.

Parſons may ſpread, dry, and ſtack the Tithes.

And if the Tithes are not carried away from the Land in a convenient and reaſonable Time after their ſetting forth, the Pariſhioner, or Owner of the Land, may either have his Action, or Diſtrein them as Damage Feaſant. See 3 *Buls.* 336. *Cro. Car.* 63. *Latch* 8. 1 *Danv.* 206. *p.* 36.

But what ſhall be ſaid a convenient and neceſſary Time, the Law doth not, nor can define; for the Variation of the Weather, the Quantity of the Tithe, Corn or Hay, *&c.* and other Circumſtances are to be conſidered.

What a convenient Time.

And therefore what ſhall in this, and all other like Caſes, be ſaid to be a reaſonable or convenient and neceſſary Time, is to be determined by a Jury, if the Point be in

How Determined.

Iſſue to be Tried by a Jury; but if it come to be determined upon a *Demurrer*, or other Matter in Law, there the Judges of the Court where the Cauſe Depends, are to reſolve and determine the ſame. See 12 *E.* 4. 6. *a.* 1 *Roll. Abr.* 643. *X.* 2.

Parſon obſtructed, is a Subſtraction. 2 Roll. 284. *F.* 21.

And if the Pariſhioner doth duly ſet forth his Tithe of Hay or Corn, *&c.* and will not permit the Parſon, Vicar, *&c.* to make the Hay, or to ſpread and dry the Corn as he ought; this, (by Virtue of the ſaid Stat. 1 *&* 2 *Ed.* 6.) amounts to a Subſtraction of Tithes, and the Parſon may Sue for the Subſtraction of ſuch Tithes in the Spiritual Court; and no Prohibition lies in this Caſe. But after the Tithes are duly ſet forth, they become Lay Chattle, and the Parſon can Sue him that takes them away, at the Common Law only. 2 *Danv.* 295. See *Moor* 912. 1 *Leon.* 39. 1 *Roll. Rep.* 56. 2 *Roll. Rep.* 440. *Cro. Eliz.* 607. 13 *Co.* 23. *Latch* 8.

Suits in the Spiritual Court, &c.

But touching Suits for Tithes either in the Spiritual Courts, or at Common Law, *&c.* ſee hereafter in its proper Chapter, where we ſhall more fully conſider the ſaid Stat. 1 *&* 2 *Ed.* 6. and the other Statutes that have been made in Conſequence thereof, for the Recovery of Tithes, *viz.* Stat. 7 *&* 8 *W.* 3. *c.* 6. and Stat. 7 *&* 8 *W.* 3. *c.* 34. and Stat. 1 *Geo.* 1. *c.* 6.

CHAP.

CHAP. VI.

What Lands were originally diſcharged of Tithes at Common Law, viz. *Antient Demeſne Lands, Barren Lands, Foreſt Lands, Waſte Lands, Derelict Lands,* &c. *alſo the Manner and Means whereby Abby Lands became diſcharged,* viz. 1. *By the Popes Bulls or Grants.* 2. *By Compoſitions Real.* 3. *Cuſtom or Preſcription. And* 4. *By Unity of Poſſeſſion. With the Authorities and Reaſons of each at large.*

What Lands at Common Law were diſcharged of Tithes.

WE intend in this Chapter to treat more particularly of Cuſtom and Preſcription, as well in Caſes *De non Decimando*, as in thoſe *De Modo Decimandi*; and alſo ſhew the ſeveral Ways and Means whereby certain Lands at the Common Law are, or have been, diſcharged from the Payment of Tithes. But firſt, a Word or two may ſeem neceſſary, in Order to ſhew what Kind of Lands are, or have been, ſo diſcharged by Common Law.

Antient Demeſne Lands.

And firſt, I conceive, that by the Common Law, none of the Lands that were Antient Demeſnes of the *Crown, and whereof the King was ſeized *jure coronæ*, and not in his Perſonal Capacity, ought to pay any Tithes, while the Lands continued in the Hands of the King, or his Farmers, or Tenants. *Vide infra.*

For theſe Lands having been *ab initio* appropriated ſolely to the Support of the Honour and Dignity of the Crown in its politick Right, were by our Anceſtors eſteemed in all Reſpects as ſacred and unalienable as any Lands given to the Church or Churchmen, and in a Chriſtian State may as truly be denominated *Terra Dedita Deo*, (*i. e.* Land conſecrated or given to God) as the other.

And hence it is, that we find, in our Common Law Books, Opinions advanced, that neither the King himſelf, nor the Parliament, could any Way alien, bind, charge, or incumber thoſe Lands. And no Wonder. For

Any Attempt in the King to do it, would have been contrary to his Coronation Oath; and if the Parliament ſhould endeavour it, it would have been contrary to their Oath of Allegiance. No Grants of our ancient Kings ever bound thoſe Lands to the Payment of Tithes; nor were Tenants in Antient Demeſne repreſented in Parliament, and

* *That Crown Lands were originally free from the Payment of Tithes*; *ſee* Prynn's *Hiſt. of King* John, *&c.* Tom. 3. pag. 70, 71, 72, 89, 90, 94, &c.

therefore not bound by the General Words of any Statute, nor by any Papal Canons, *&c.*

But I ſhall forbear to offer what I further might under this Head, 'till call'd on.

Barren Lands, &c.

As to Barren Lands, Heaths, Commons, and Waſte Lands, and the like of that Kind, I conceive, that no Tithes at the Common Law either did, or poſſibly could be paid of ſuch Lands. For the Rule is, *ubi non eſt annua renovatio ibi Decimæ ſolvi non debent, i. e.* Where there is not a certain annual Increaſe, there no Tithes ought to be paid.

And this Rule is ſo clear in the Caſe of Barren Lands, or Heath, or Waſte Grounds, *&c.* That the Stat. 2, 3 *Ed.* 6. *c.* 13. has provided, That although the ſame ſhould be improved, and converted into Arable or Meadow, *&c.* Yet no Tithes ſhould be paid thereof 'till ſeven Years after ſuch Improvement. See the Statute hereafter, Chap. 7 and 8.

Wood lands.

And as in the Caſe of Antient Demeſne Lands, and Barren Lands, *&c.* no Tithes were to be paid at Common Law; ſo I conceive (for the Reaſons aſſigned in both the former Inſtances) no Tithes ought to be paid for Foreſt or Woodlands, that are not *Sylvæ cæduæ.*

Note all Foreſt-Lands were generally the King's, and Antient Demeſne.

For firſt, ſuch Foreſts and Woods being the proper Nurſeries of Timber-Trees, and conſequently of a publick Benefit to the Nation, it was held, that the publick Good ought not to be leſſened by the Claim or Intereſt of particular Perſons, eſpecially for that the Church in general, as well as the State, were intereſted in the Preſervation of thoſe Nurſeries.

But ſecondly, here was no *Annua Renovatio*, and ſo thoſe Lands not falling within that Rule of Tithing, no Tithes could be paid for the ſame. For Tithes properly are to be paid in Kind, but where there is no annual Renovation, Nothing can ariſe whereof Tithes may be paid in Kind; and where Nothing can be annually paid in Kind, I conceive no *Modus Decimandi* can be good. For that were to erect a *Modus eſſendi* for a *Non-entity*; and therefore I conclude the Lands before-mentioned to have been diſcharged, as *in non Decimando*, *i. e.* freed from all Tithes, by our antient Common Law.

And the like may be ſaid of *Extraparochial* and *Derelict* Lands.

Abby Lands, &c. Indeed ſuch Lands, as we call Abby Lands, ſeem to me to fall under another Conſideration; they were not ſuch Lands as were exempted, either by their own Nature, or from any publick Benefit that was intended to the Nation in their original Donation, being given as Free Alms only to particular Orders or Societies of Men, and thoſe not always Eccleſiaſtick. (For the *Templars* and *Hoſpitalers* were not ſo.) And ſometimes to Aliens and Foreigners, as moſt of the *Ciſtertian* Order were; ſo that it was neceſſary their Exemptions and Diſcharges from Tithes, which could not be founded on the Common Law, ſhould have ſome other Means or Methods for their Support.

But theſe Men having *per Fas & Nefas* obtained large Endowments of Lands, on their Abbies, Monaſteries and Houſes, were very earneſt to have thoſe Lands exempted, not

not only from all ſecular Duties, but alſo from all ſpiritual Charges, and conſequently from the Payment of Tithes. For at firſt they were forced to bear that Burden, equal with Laymen, notwithſtanding their Pretence to Religion.

Our Parliaments, and the Temporal Power were averſe to ſuch particular Exemptions, which in Effect burdened the People with what thoſe Men were unwilling to bear; whereupon they ſolicite the Pope, and by his Favour obtained thoſe Bulls and Papal Grants, which were the Foundation of their being exempted from the Payment of Tithes. And hence it is commonly ſaid in our Books, that thoſe Lands were originally privileged or diſcharged from the Payment of Tithes, by four Ways or Means, at Common Law.

1. By *Bulls* or *Grants* of *Popes*, or Canons of Councils. (Not a Word of *Kings* or *Parliaments*.)
2. By *Compoſitions Real* (i. e. the Conſent of all Parties concerned.)
3. By *Cuſtom* or *Preſcription*, (ſomething of which you have before.)
4. By *Unity* of *Poſſeſſion*, (which is a Kind of Preſcription.)

Of each of theſe in their Order.

What Abby Lands at firſt diſcharged.

It appears that antiently there were many and large Eſtates belonging to Abbies, Monaſteries, *&c.* which were, either by the Popes Bulls or Canons, wholly exempted from paying Tithes, as all the Lands belonging to the *Ciſtertian* Monks and the *Præ-*

monſtratenſes; and ſo were thoſe of the *Knights Templars*, and *Knights Hoſpitalers*, of the Order of St. *John* of *Jeruſalem*.

By Popes Bulls, and when, &c.

But yet, all Abbots and Priors, and other Chief Monks, originally paid Tithes, as well as other Men, 'till Pope *Paſchal*, at the Council of *Mentz* ordained, that they ſhould not pay Tithes *de* (*agris vel*) *Laboribus ſuis*. And this continued as a general Diſcharge, 'till the Time of King *Hen.* 2. when Pope *Adrian* reſtrained it to three Orders only, *viz.* the *Ciſtertians*, the *Templars*, and the *Hoſpitallers*, and the Diſcharge, which the *Præmonſtratenſes* had, was given them by Bull of Pope *Innocent* the Third; and this made up the four Orders, which are commonly called the privileged Orders, for that they claimed a Privilege to be diſcharged of Tithes by ſuch Bulls as aforeſaid.

Four Privileged Orders, Ciſtertians, Templars, &c.

But ſome of theſe Orders being only a Species of Lay-brethren, as the *Knights Templars* and *Hoſpitalers*, whatever Exemptions they had for Nonpayment of Tithes, became in Time a Nuſance to the Church, and was in Effect a Depriving her of what ſhe has ſince claimed as her ſole and Divine Right. And therefore in the ſecond Council of *Lateran* it was provided, That the Privilege of the *Templars*, &c. ſhould not be extended to their Farmers, *ne Eccleſia nimium gravaretur*, *&c.* See 2 *Roll. Rep. Dickenſon* v. *Greenhall.*

Templars diſſolved.

In the ſeventeenth Year of *Ed.* 2. The Order of the *Templars* was diſſolved, and their Poſſeſſions given to the Order of St. *John* of *Jeruſalem*; which, as I apprehend, being

being done by Act of Parliament, they did not claim ſuch Privilege of Diſcharge by any Bull or Grant of the Pope, or other Spiritual Canon, or Conſtitution; but they claimed it by Preſcription (which is private Common Law) as appears by the Stat. *Weſtm.* 2. *c.* 24. Yet ſee 2 *Brownl. Hurry* v. *Boyer, Rep. Can.* 402, 403; where, 'tis ſaid, they had this Privilege from *Rome*, and that it was confirmed by divers Councils and Canons, *&c.*

Such Grants, &c. not good, unleſs allow'd by Preſcription.

But it ſeems clear to me, That no Diſcharge of Abby Lands, whether the ſame originally were by either of the former Ways, *i. e.* Bull or Canon, Compoſition Real, or Unity of Poſſeſſion can at this Day be good, except it has been allow'd by Cuſtom or Preſcription, or has the Authority of ſome Act of Parliament to ſupport it: And it has been reſolved, That in the Caſe of ſuch Abby Lands, as were ſo diſcharged, or came to the Crown by the Statute of Diſſolutions 31 *H.* 8. it will be ſufficient to ſay in pleading, That they have been held Tithe-free Time out of Mind; and where it ſo appears, ſuch Diſcharge, tho' originally made by the Pope's Bull or Grant, or by the Canons or Conſtitutions of a Council, *&c.* will be allowed for good at this Day. See *Noy* 97. 1 *Jon.* 6. and 368. *Hob.* 295.

And ſo, if an Abbot or Prior were ſeiz'd of Abby Lands diſcharged of Tithes by 31 *H.* 8. (*Qu.* 27 *H.* 8.) He, that is now Farmer (or Occupier) of ſuch Land, ſhall be admitted to preſcribe *in non Decimando*, by the Statute of 1, 2 *Ed.* 6. which Enacts, *That none pay Tithes otherways than they were pay'd for*

for forty Years before: Which Words ſeem to have reduced all other Methods to meer Cuſtom and Preſcription. See *Moor* 219. *Vide ante.*

But no Abbot or Prior could make ſuch Preſcription, whoſe Houſe was not founded before Time of Memory, *i. e.* 1 *R.* 1. or 1120. For that is the Time of Limitation of all Preſcriptions at the Common Law, as we have before ſhewn in the precedent Chap. See 3 *Keb.* 45, 217. *Raym.* 225. 2 *Roll. Abr.* 269.

Bulls, &c. complained of in Parliament, and ſuppreſſed

But we may here obſerve, That ſuch Diſcharges of Tithes by the Pope's Bull, or Grant, were long ſince grievouſly complained of by both the Clergy and Laity of this Kingdom, as appears from many Inſtances in our Hiſtories and Records. See *Matt. Paris*, and *Prynn*'s King *John*, &c.

And at Length, the Practice of purchaſing ſuch Bulls was reſtrained ſo, that it was made a *Præmunire* to put the ſame in Execution, or to claim any ſuch Diſcharge by Virtue thereof, as appears by two ſeveral Statutes made in the Beginning of the Reign of King *H.* 4. *viz.*

by Stat. 2. H. 4. *c.* 4.

Stat. 2 *H.* 4. *c.* 4. which Enacts thus: 'I-'tem, Foraſmuch as our Lord the King, up-'on grievous Complaint made to him in this 'Parliament, (by the Commons) hath per-'ceived, that the Religious Men of the 'Order of *Ciſteaux*, (*Ciſtertians* Aliens) in 'the Realm of *England*, have purchaſed 'certain Bulls to be quit and diſcharged to 'pay the Tithes of their Lands, Tenements 'and Poſſeſſions let to Farm, or manured 'or occupied by other Perſons, than by 'them-

'themſelves, in great Prejudice and Dero-
'gation of the Liberty of Holy Church, and
'of many Liege People of the Realm. Our
'Lord the King, willing thereupon to or-
'dain Remedy by the Advice and Aſſent of
'the Lords Spiritual and Temporal, and at
'the Inſtance and Requeſt of the ſaid Com-
'mons hath ordained and eſtabliſhed, That
'the Religious Perſons of the ſaid Order of
'*Ciſteaux* ſhall ſtand in the State that they
'were in, before the Time of ſuch Bulls
'purchaſed.

'And that as well they of the ſaid Or- *And other Or-*
'der, as all other Religious and Seculars, *ders.*
'of what Eſtate or Condition they be, which
'do put the ſaid Bulls in Execution, or
'from henceforth do purchaſe other ſuch
'Bulls of new, or by Colour of the ſame
'Bulls purchaſed, do take Advantage (there-
'of) in any Manner; That Proceſs ſhall be
'made againſt them, and every of them, by
'Garniſhment of two Months, by Writ of
'*Præmunire facias*; and if they make Default,
'or be attainted (thereof) then they ſhall in-
'cur the Pains and Forfeitures contained in
'the Statute of Proviſors, made in the thir-
'teenth Year of the ſaid King *Richard*.

And by Stat. 7. *H.* 4. *c.* 6. it was alſo En- *And* 7 H. 4.
acted, 'That no Perſon, Religious nor Se- *cap.* 6.
'cular, of what Eſtate or Condition that he
'be, by Colour of any Bulls containing ſuch
'Privileges to be diſcharged of Diſmes (or
'Tithes) pertaining to Pariſh Churches,
'Prebends, Hoſpitals or Vicarages, purcha-
'ſed before the firſt Year of King *Richard* *Bulls purcha-*
'the Second, after the Conqueſt, or ſithence *ſed before* 1
'not executed, ſhall put in Execution any *R.* 2. *made*
'ſuch *void*, &c.

'ſuch Bulls ſo purchaſed, or any ſuch Bulls 'to be purchaſed in Time to come. And 'if any ſuch Religious or Secular Perſon, 'of what Eſtate or Condition he be, from 'henceforth by Colour of ſuch Bulls, do 'trouble any Perſon of Holy Church, Pre-'bendaries, Wardens of Hoſpitals or Vicars, 'ſo that they cannot take or enjoy the 'Diſmes due or pertaining to them, of their 'ſaid Benefices, that then ſuch Diſturbers 'ſhall incur the like Proceſs and Pain, as is 'ordained by the Statute, made againſt 'them of the Order of *Ciſteaux* in the Se-'cond Year of the Reign of our ſaid Lord 'the King that now is.'

Conſequence of the ſaid Stat.

By which laſt Statute it appears, That as the Lands of Churches, *&c.* founded ſince the Firſt Year of King *R.* 1. as aforeſaid, cannot plead Preſcription for an abſolute Diſcharge of Tithes; ſo neither by reaſon of this Statute can any Pope's Bulls purchaſed before 1 *R.* 2. or afterwards, he pleaded as an abſolute Diſcharge, *viz.* not only for the Owners, whilſt occupied by themſelves, but alſo for their Farmers, Tenants, or Occupiers, whether the Eſtate was belonging to any religious Perſons, or did, or doth at this Day belong to any of the ſecular Clergy.

Secondly by Real Compoſition.

And yet it ſeems, That a *Real Compoſition*, if it can be ſhewed, may be a ſufficient Diſcharge of the Tithes of ſuch Lands, provided it was made ſince the ſaid Statute, or ſince the Time of Limitation of Preſcription; and alſo provided it was made before the Statute 1 *Eliz.* where the Tithes did belong to an Archbiſhop, or Biſhop; or Stat. 13 *Eliz.* where they belonged to any College,

lege, Dean, Dean and Chapter, Arch-deacon, Prebend, Parſon, Vicar, *&c.* See the Caſe of *Ingoldsby* and *Wyvell*, *&c. infra.*

Compoſition Real.

And further, as to Diſcharges by Real Compoſition, we may obſerve, That Tithes *de Jure communi* are not to be paid, either of the Earth or the Land itſelf, nor of Houſes or Habitations, *&c.* erected upon the Land, or fix'd thereto. But by Cuſtom Tithes may be paid thereof.

What it is, and how made.

Now a Real Compoſition is, when an Agreement is made with the Parſon or Vicar, together with the Aſſent of the Patron or Patrons, and Ordinary, That certain Lands ſhall for the Future be diſcharged from the Payment of Tithes, in Specie, by Reaſon of a Recompence agreed to be paid or made to the Parſon, *&c.* in Reſpect thereof in Money, either as an entire Sum, or as an yearly Payment, or by Settlement of Lands upon the Incumbent and his Succeſſors for ever, or by doing ſome other Thing that will be of Advantage to the Parſon or Vicar, to whom the Right of Tithes doth otherwiſe belong. See *Dr. & Stud. Lib.* 2. *c.* 55. *March* 87. 1 *Jon.* 368. and that Lands might antiently be diſcarged by ſuch Compoſitions, ſee *Regiſter of Writs*, fol. 38. and *Fitz. Nat. Brev.* f. 44.

Antiently.

What Compoſitions are good, or not.

But ſuch Compoſitions to make it binding, as to the Succeſſors, muſt be made either by Deed under Hand and Seal, or by Fine in the King's Courts. *Hob.* 176.

It alſo ought to be by apt Words; for if the Words of ſuch Contract or Agreement be *quod partes prædict' inter ſe convenerunt*, this

this is not ſufficient to make it a Real Compoſition, ſo as to bind the Succeſſors, altho' the Biſhop calls it *Realis Compoſitio*; for his calling of it ſo, will not alter the Nature of it; but notwithſtanding the Biſhop's Confirmation, it ſhall ſtill remain as a Perſonal Agreement, binding and obliging the Parties thereto only, and ſhall not be extended to Succeſſors, *&c.* See *Marſh* 87. *Quære Mildmay*'s Caſe in *Hutton.*

Poſt. 210.

And if the Parſon or Vicar make any Compoſition with his Pariſhioner, without his Patron and Ordinary, it ſhall bind only for the Parſon's Life, and during his Incumbency. See *Rep. Canon.* 392, 393.

This Compoſition is either between the Parſon and his Pariſhioner, or *inter Clericos*; if it be between the Parſon and his Pariſhioner, and it be touching Tithes paſt, the Compoſition is good, though it be without any Conſideration at all. But if it be touching Tithes to come, it may be good as to a Payment of Tithes only in Part, but cannot be good as to a Non-payment of any Tithes at all; nor is it good in Part, *&c.* without the Biſhop's Approbation and Confirmation.

If the Compoſition be *inter Clericos*, and the Tithes be Perſonal Tithes, it will not hold good; but if they be Predial Tithes, the Compoſition will hold good, if the Approbation or Confirmation of the Biſhop of the Dioceſe be had thereto.

From whence it appears, that a Compoſition for the remitting or taking away the Tithes entirely, is not good in Law. But a Compoſition with the Parſon or Vicar,

to have only the thirteenth Sheaf for his Tithe, was held to be a good Compoſition, and to bind the Parſon. See *Hughe's Parſons Law*, Chap. 27.

A Compoſition may likewiſe avoid the Payment of Tithes in Kind. And if it be made with a Parſon or Vicar to pay a *Modus decimandi*, which hath continued Time out of Mind; here Cuſtom being equivalent to Law, makes it good, and it ſhall bind the Parſon and his Succeſſors. See 8 *H.* 6. 22, 23. 9 *H.* 6. 17. 6 *E.* 3. 27. 17 *E.* 3. 11. 12 *H.* 4. 13. 19 *H.* 6. 75. 31 *H.* 6. 28. 34 *H.* 6. 36. 35 *H.* 6. 5. 26 *H.* 8. 7. 27 *H.* 8. 20 & 21 *accord'*.

So that a *Modus* on a Park, not Time out of Mind, &c. is properly no *Modus*, but may be refuſed by the preſent Incumbent. For a *Modus* cannot begin at this Day, or within Time of Mind; but though a *Modus decimandi* cannot begin at this Day, but muſt be by Preſcription, yet a Compoſition (Perſonal) may be made, which ſhall bind, during the Life of him that made it. See *March.* 87. *Park.*

And note; a real Contract or Conpoſition, although it be made between Spiritual Perſons, is only determinable at Common Law. *Vide ibid.* And it is ſaid, that after a Compoſition is duly and firmly made, if the Lands be transferred or granted to another, the Feoffee, or Grantee, ſhall have the Benefit thereof. 1 *Jon.* 268. *Compoſitions determinable only at Common Law.*

It was found by Special Verdict, That the Abby of *Fountaines*, of the Order of *Ceſtertians*, was, before the Council of *Lateran*, ſeiſed *Between an Abbot and a Prebend.*

ſeized of the Grange of *S.* within the Prebend of *R.* and that between the Years 1216 and 1261. a Compoſition was made between the Abbot and Convent and the Prebendary of the ſaid Prebend, that the ſaid Abbot and Convent ſhould for ever be free from the Payment of any Tithes of the Lands, which they tilled at their own Charge, within their ſaid Grange, *Anno Dom.* 1216. and that they ſhould pay Tithes for all other Lands there and elſewhere; and that the ſaid Abbot, *&c.* ſhould pay annually to the ſaid Prebendary and his Succeſſors, the Sum of five Marks: And the ſaid Verdict further found, That *Anno Dom.* 1359. another Compoſition was made betwixt them, reciting the former, (but they do not find that it was confirmed by the Patron and Ordinary) and by this later Compoſition, the Prebendary and his Succeſſors were to have their Election for all Times to come, yearly, either to receive Tithes in Kind of Corn or Grain, ariſing within the Places aforeſaid, as well of Lands in the Hands of the Abbot, as in the Hands of the Tenants, or elſe five Marks to be paid in Lieu thereof, ſo as ſuch Election was notified to the Abbot, or any of the Monks, *&c.* in the Preſence of a Proctor or of two good Men; and when Notice was ſo given, the Prebendary was to be content with the five Marks, *&c.*

First, and

Second Compoſition.

In this Caſe the Court were of Opinion, that the ſecond Compoſition did not affect the Succeſſors of the Prebendary, and therefore the Abbot was not bound by it. And the Reaſon why the Succeſſors of the Prebendary

If one Party not bound, the other is not.

bendary were not bound, ſeems to be, becauſe by the firſt Compoſition the Prebendary was only bound *quamdiu propriis Manibus, &c.* and by the ſecond Compoſition, the five Marks go in Recompence of all, whether in *propriis manibus*, or in the Hands of Tenants. Secondly, the Court held, That the Power of Election was gone, becauſe it cannot be made according to the Compoſition; and that therefore the firſt Compoſition ſhould ſtand *quoad* the Lands *in propriis manibus*; and for the others Tithes in Kind may be taken as before; and Judgment was given accordingly. See *Hardr.* 381. *Ingoldsby* v. *Wywell, &c.*

With Biſhops, &c. void by Stat. 1 Eliz. *and with Deans, &c. by* 13 Eliz.

But note; if any Real Compoſition hath been made with any *Archbiſhop*, or *Biſhop*, ſince the firſt of *Eliz.* or with any *Dean and Chapter*, *College*, *Arch-Deacon*, *Prebendary*, *Parſon*, *Vicar*, *&c.* ſince the 13th of *Eliz.* the ſame is void, or at leaſt voidable, by theſe Statutes, as to all Succeſſors whatſoever.

For by the Statute 1 *Eliz. Archbiſhops and Biſhops*; and by Stat. 13 *Eliz. c.* 10. *All Collegiate and other* Eccleſiaſtical Corporations, aggregate or ſole, are reſtrained from making any Grants, other than for one and twenty Years, or for three Lives, with other Qualifications. *Vide poſt.*

No real Compoſition, tho' ſo named.

In 17 *Car.* 1. *B. R.* the Caſe of one *Hitchcock* was thus: A Vicar contracted with a Pariſhioner by the Words *Inter ſe Convenerunt*, the one to take, and the other to pay, ſo much for Increaſe of Tithes; and the Biſhop confirms this as a real Compoſition, being for the Advantage of the Church. The

Vicar died, and his Succeſſor ſued for a Performance in the Spiritual Court; and in this Caſe a Prohibition was granted, and it was held to be no real Compoſition (altho' the Biſhop called it ſo) but only a Perſonal Agreement.

Ante 206.

Triable at Common Law.

And note; in that Caſe it was ſaid, That ſuppoſing it had been a real Contract, and made between Spiritual Perſons, and only concerning Spiritual Things, that yet it was ſueable only in the Courts of Common Law, and ſhould not bind either the Succeſſor of the one, or the Heir, *&c.* of the other. See *Parſons Law* 252. 1 *Leon.* 128.

Binds only the Parties.

But where a Man ſowed his Lands with Corn; and afterwards the Heir makes a Compoſition with the Parſon or Vicar, to have but the 13th Sheaf for his Tithe; this was held to be a good Compoſition, ſo as to bind the Parſon (but not his Succeſſors.)

Yet Tenant in Dower may have Benefit.

And if afterwards the Heir doth endow his Mother of the third Part of the Lands, the Mother ſhould have the Benefit of this Compoſition, although ſhe came in by a Title Paramount, and antecedent to the ſame. *Parſons Law* 251.

If Parſon compounds with one, his Executors, &c. it binds.

A Parſon did covenant with *A.* his Executors and Aſſigns, that for 10*s.* to him paid every Year by *A.* his Executors, or Aſſigns, that he, his Executors and Aſſigns, ſhould be quit of the Tithes of ſuch Lands, during the Life of the Parſon. *A.* pays the 10*s.* yearly to the Parſon, which he accepts; and afterwards *A.* makes *B.* an Infant, his Executor, and died; and Adminiſtration, *durante minore ætate* of the Infant, was

was committed to another, who leaſed the Lands at Will. The Parſon libelled in the Spiritual Court, to have Tithes in Kind of the Land; and the Court of *B. R.* upon Motion, *&c.* awarded a Prohibition, and adjudged,

1. That the Agreement and Compoſition did bind the Parſon during his Life.
2. That altho' the Aſſignee could not ſue the Parſon upon the Contract; Yet,
3. He ſhould have a Prohibition to ſtay the Parſon's Suit in the Spiritual Court. *Suit thereon in* B. R. *&c.*
4. That the Parſon may have his Remedy here for the 10 *s.* yearly, upon the Contract.
5. For that he could not have Tithes in Kind, becauſe of the Compoſition. See *Parſons Law*, 252. and *Snell* and *Bennet's* Caſe, and *Fulder* and *Griffin's* there cited.

Alſo an Agreement between the Parſon and his Pariſhioners, is a good Cauſe for a Prohibition, where the Parſon libels againſt his own Agreement. See 1 *Leon.* 151, *&c.*

A Parſon grants to his Pariſhioners by Parol, that they may have their Tithes by Way of Retainer for three Years; and this was held good. But otherwiſe it is, if the Agreement had been to have, or retain them, as long as the Parties ſhall live; ſee *Telv.* 94, 95. *Tanner* and *Small's* Caſe adjudged accordingly; and 2 *Cro.* 417. accords. See alſo 1 *Salk.* 144. The Caſe of a Compoſition for Tithes, *Quamdiu ambobus partibus placuerit, &c.* *Compoſition by Parol.* Quamdiu, &c.

A Modus *implies a Compoſition.*

And note; as every *Modus Decimandi* is by Preſcription, ſo it is intended to have its Commencement upon ſome Compoſition or Agreement, at the firſt made for a valuable Conſideration, with the Parſon or Vicar, *&c.* and therefore although Tithes in Kind have been paid for twenty or thirty Years together, yet ſuch Payments ſhall not deſtroy a *Modus.* (Which, if reaſonable, is always ſuppoſed to be founded upon a real Compoſition.) And ſo it was adjudged in the Caſe of *Mildmay* and *Hutton. Mic.* 6 *Jac.* 1. *B. R.* See *Parſons Law*, 153. See alſo *Nowel* and *Hicks's* Caſe, 2 *Inſt.* 653. and *Fitz.* Tit. *Judgment*, 133, and 155. When a Cuſtom creates an Inheritance, it cannot be waved or annulled by Payment, or other Matter *in Pais.*

Tithes changeable by Law.

And note; it is agreed for Law in *Dr. & Stud. lib.* 2. *c.* 55. That if it were ordained by a Law, That Payment of Tithes in Kind ſhould ceaſe, and that every Curate, *&c.* ſhould have aſſigned unto him ſuch a Portion of Land, or ſuch a Rent or Annuity as ſhould be ſufficient for his Maintenance; or that every Pariſhioner ſhould give a certain Sum of Money towards the Maintenance of their Curate, *&c.* ſuch Law would be a good Law *.

Degg 303.

Compoſitions real founded on Cuſtom.

From whence it follows, that if Tithes may be ſo changed, by a poſitive Law, into a Rent or Annuity, or other Proviſion of

* Vide *Rebuff.* Tract. De Decimis, Quæſtion. 13. An Decimæ tolli poſſint? Reſp. Affirmative, Quod multis caſubus demonſtrat.

Mainte-

Maintenance, as aforeſaid, there is no Queſtion to be made, but a Compoſition made with the Parſon or Vicar to pay a *Modus Decimandi*, which hath continued Time out of Mind, (Cuſtom being equivalent to Law) it is good as a *Modus* or Cuſtom, and ſhall bind the Parſon and his Succeſſors; and ſee 17 *E.* 3. 11. 41 *E.* 3. 27. 12 *H.* 4. 13. 8 *H.* 6. 12. 9 *H.* 6. 17. 19 *Hen.* 6. 75. 31 *H.* 6. 28. 34 *H.* 6. 36. 35 *H.* 6. 5. 26 *H.* 8. 7. 27 *H.* 8. 20, & 21. agree herewith.

But note; neither a *Modus Decimandi*, nor a Compoſition Real, can begin at this Day, but muſt be by Preſcription; and yet at this Day a Compoſition or Agreement to accept of Money, or other Things, in Lieu of Tithes, may be made for Life or Years, &c. as aforeſaid, and ſhall bind the Parties accordingly.

And if any Parſon or Vicar doth make ſuch Compoſition for the binding of himſelf only *during his Time*, he ſhall not be bound thereby, but only whilſt he is reſident and ſerving the Cure, without being abſent therefrom by the Space of eighty Days in the whole Year. And ſuch Compoſitions are, at beſt, no more than *Perſonal Agreements*.

Real Compoſitions reſolved into Cuſtom, &c.

So that all *Real Compoſitions*, as well as Bulls, Grants, Canons and Eccleſiaſtical Conſtitutions, ſeem now reſolved into the General Rule of Preſcriptions, *i. e.* not to be of any Force, but where they have been uſed Time out of Mind. And as a Cuſtom, or *Modus Decimandi*, cannot begin at this Day, ſo neither can a Real Compoſition.

Preſcriptions de Modo Decimandi, or de non Decimando.

I have already, in the foregoing Chapter, ſhewn what Preſcription is, and wherein it differs from, or agrees with, what is commonly called *Cuſtom.* And that a Preſcription reſpects one Man, or ſome few in particular: But a Cuſtom extends to many, as a County, Hundred, *&c.* alſo that a Preſcription is Perſonal, and made in the Name of a certain Perſon, or his Anceſtors, or thoſe whoſe Eſtate he poſſeſſes: But a Cuſtom is always local, and alledged in no certain Perſon, but only, That within ſuch a Hundred, Manor, *&c.* there is ſuch or ſuch a Cuſtom. See 4 *Coke, Froiſton* and *Cratchwood*'s Caſe.

We may alſo further obſerve, That Preſcription is ſometimes called a *Publick Privilege*, and Cuſtom may well be denominated private Common Law. And that both Cuſtom and Preſcription will ſupport either a *Modus Decimandi*, or a *non Decimando.*

De non Decimando, where good.

That either a Cuſtom, or Preſcription, *De Modo Decimandi*, may be good, none at this Day will deny; and it may eaſily be proved to be alſo good *De non Decimando.* For Inſtance: It is admitted that Spiritual Perſons may well preſcribe *in Non Decimando*, and ſo may their Farmers and Tenants, and hence it is that a Parſon of one Pariſh, having *Glebe* in another, may preſcribe *in non Decimando* for ſuch *Glebe.* See 1 *Roll. Abr.* 653. *H.* 3. 5.

So a Biſhop may preſcribe *in non Decimando*, ſo as to be diſcharged of Tithes for himſelf, his Farmers and Tenants at Will, for certain Lands in the Pariſh or Dioceſe

of

of another. See 2 *Co.* 44. adjudged. And ſo *Mich.* 15 *Jac.* 1. the ſame Caſe or Point came again in Queſtion, and adjudged, and a Prohibition granted accordingly. And ſo *Mich.* 13 *Jac.* 1. in another Caſe. See 1 *Roll. Abr.* 653. *H.* 3. *Biſhops,*

And ſo was adjudged the Caſe of the Biſhop of *Lincoln* and *Cooper*, *Cro. Eliz.* 216. and 1 *Leon.* 248. And though it appeared, That in the Time of *Ed.* 6. the Manor was granted to the Duke of *Somerſet* in Fee, and after regranted to the Biſhop; yet it was held, That the Preſcription *De non Decimando* was not deſtroyed. 2 *Danv.* 619. *pl.* 3.

But if the King has Lands diſcharged of Tithes by Preſcription, and he aliens them, the Preſcription is deſtroyed, though the Lands come to the King's Hands again by Eſcheat, or otherways. See *Hardr.* 314. *Sed Quære Legem.*

That a Dean and Chapter may preſcribe *in non Decimando*, ſee *Winch* 65. *Cro. Eliz.* 475. *Moor* 425, 431. Alſo, when Lands are ſo diſcharged by Preſcription *in non Decimendo*, in the Hands of a Spiritual Perſon, if he leaſes it for Years to a Layman, ſuch Leſſee may alſo preſcribe *in non Decimando*, becauſe the Lands are diſcharged *in Facto*. See 2 *Co.* 25. adjudged. And ſee alſo *Cro. El.* 475, 511, 512. *Moor* 219, 598. *Hob.* 42. *Dean and Chapter.* *Their Leſſees.*

So the Copyholders of Inheritance, who hold of a Biſhop, *&c.* as of his Manor, may preſcribe, that the Biſhop and his Predeceſſors, ſeized of the ſaid Manor for themſelves and their Tenants, for Life or Years; and *Copyholders.*

Tenants by Copy of Court-Roll of the ſaid Manor, Time out of Memory, *&c.* have been diſcharged of the Payment of Tithes for their Lands Parcel of the ſaid Manor. For this is a good Preſcription, and the Copyholders ſhall be diſcharged of Tithes thereby; for their Tenements are Parcel of the *Demeaſns* of the Manor, and this might commence upon a real Compoſition for the whole Manor. See 1 *Roll. Abr.* 653. *H.* 7. and ſo *Cro. El.* 704, 784. S. C. *&* S. P. adjudged, and ſo is *Moor* 844. and *Yelv.* 2. by three Judges againſt one; ſee alſo *Noy* 132.

Preſcriptions to be diſcharged of Tithes.

And altho' Laymen, as 'tis ſaid, were not capable of Tithes in *Pernancy* at the Common Law, yet 'tis admitted, That at Common Law they were capable of a Diſcharge of Tithes in their own Hands, with Conſent of the Incumbent, Patron and Ordinary, *viz.* by Grant or Compoſition. See 8 *E.* 4. 14 *Reg.* 38. *Bro. Diſmes* 93, *&c.*

And De Modo Decimandi.

Alſo 'tis generally allowed, That by the Common Law a Layman might preſcribe *De modo Decimandi.* See 2 *Co.* 44. 13 *Co.* 13, *&c.*

What Kinds of non Decimando.

For Inſtance: A Layman may preſcribe That he, and all thoſe whoſe Eſtate he hath in the Manor of *B.* Time out of mind have paid to the Parſon for the Time being, a certain Penſion yearly for Maintenance of Divine Service there, in Satisfaction of all Tithes renewing or ariſing within the ſaid Manor; and further may preſcribe, That he, and all thoſe, whoſe Eſtate he hath in the ſaid Manor, Time out of Mind have uſed, in reſpect of the ſaid Penſion ſo paid

to the Parſon, to have the tenth Part of all the Corn within the ſaid Manor, or any other Part thereof, or of all the Lands holden within the ſaid Manor; and ſuch Preſcriptions are allow'd to be good. For it ſhall be intended, That at the Beginning the Lord had all the Lands and Tithes in his own Hands, and afterwards gave the Tenancies to hold of him retaining the Tithes. So that now he takes only the Tithes by Reteiner, which he had before in his own Hands. See 3 *Cro.* 763. *Pigott* v. *Sympſon.*

Allow'd to Laymen.

And of this later Kind of Preſcription, for the Lord to have the tenth Shock of Corn from his Tenants, there is this Reaſon alſo given, *viz.* becauſe he has it not as Tithes, but as Parcel of his Manor, and as a thing appurtenant thereto; for tho' tis ſaid, a Layman could not by the Common Law have Tithes, as Tithes, (*quia Sacra & Dedita Deo*) yet it was allowed he might have the Tenth Shock, or Sheaf of Corn, *&c.* as a temporal Profit Apprender, and ſuch Tenths might well be, and paſs as Parcel of a Manor. But it is otherwiſe of Tithes, for they cannot be Parcel of, nor appendant to a Manor, as was adjudged in *Winſcomb*'s Caſe, 3 *Cro.* 293. See 10 *E.* 3. 5.

Ratio.

Difference of Tithes and Tenths.

And for this Reaſon it is, That a Layman cannot preſcribe generally in himſelf and all thoſe whoſe Eſtate he hath in a Manor, to have any Tithes appertaining to the ſame, without ſome ſpecial Matter ſhewed, as a Compoſition Real, or other Satisfaction or Conſideration for the ſame, as aforeſaid. *Vide ante* of *Compoſitions Real.*

And

And of Decimam Garbam & Decimas Garbarum.

And for the ſame Reaſon it is, That a Layman cannot preſcribe to have *Decimas Garbarum*, or Tithes of Sheafs of Corn; but 'tis admitted, a Layman may have *Decimam Garbam*, or the Tenth Sheaf of Corn. See for this 2 *Co.* 45. and 3 *Cro.* 293, 599.

Tithes to be paid notwithſtanding ſuch Preſcription.

But note; where the Preſcription is to have *Decimam Garbam*, this is always to be underſtood as a Lay Fee to be taken after the Parſon's Tithes ſet forth, *&c.* and is not to be intended the Tithes. For in ſuch Caſe, the Land, notwithſtanding ſuch Preſcription, ſhall be liable to pay Tithes to the Parſon, or other Proprietor of the Tithes of the Pariſh where the Lands do lie. See 44 *Aſſ.* 25.

A Layman may have a Portion of Tithes by Preſcription.

But a Layman may at this Day have a Portion of Tithes within a Pariſh, by Grant from the Crown, laying a Preſcription, or Unity of Poſſeſſion, Time out of mind, *&c.* in ſome of the diſſolved Religious Houſes, who were ſeized of ſuch Portion of Tithes, and which by the Diſſolution of Monaſteries, *&c.* came to the Crown, and was granted by the King to ſuch Layman, who claims by, or under ſuch Grant. See 4 *Co.* 35. 1 *Roll. Abr.* 657.

Layman preſcribes to be quit of Tithes.

Alſo, if a Layman Grants Parcel of his Manor to a Parſon in Fee, and the Parſon with Aſſent of the Ordinary, without the Patron (*Quære* if he himſelf was not Patron?) in Conſideration of that Grant, grants to him, That he ſhall be quit of Tithes for the Reſidue of the Manor; and it afterwards happens, That he, or his Aſſignee, is ſued in the Spiritual Court for the Tithes of this Manor;

Manor; they may have a Prohibition, altho' the Grant was made before Time of Memory, if he has always ſince continued to be quit of Tithes. See 8 *E.* 4. 14. *Fitz. Nat. Br.* 41. *G.* 3. 3. *E.* 3. 17. 16 *E.* 3. Annuity 24.

In Conſideration of Lands, &c.

So, if the Lord of a Manor hath always held his Manor diſcharged of Tithes, in Conſideration that the Parſon's Predeceſſors before Time of Memory, or in antient Times, had divers Lands in the ſame Pariſh, of the Gift of the Anceſtors of the ſaid Lord, of which the Parſon is ſeized at this Day in Fee; here, if the Parſon ſues for Tithes of the Manor, the Lord may ſhew this ſpecial Matter, and how that the Parſon and his Succeſſors, Time out of Mind, have holden thoſe Lands, *&c.* of the Gift of one of his Anceſtors, or whoſe Eſtate he hath in the ſaid Manor, *&c.* in full Satisfaction of the ſaid Tithes; and the Proof that the Lord of the Manor gave the Lands, and that no Tithes have been paid, is at this Day good Evidence to prove the Surmiſe of the Prohibition, That he gave them to the End, that Tithes of the ſaid Manor ſhould never be paid. See 13 *Co.* 15.

Proof v. infra.

Preſcription for a Layman to have the Tithes, on maintaining a Chaplain.

Yet when a Prohibition was granted upon this Suggeſtion, That one being a Layman was ſeized of the Manor of *D.* and that he, and all thoſe who Eſtate he had, Time out of Mind, *&c.* had uſed to have the Tithes within the ſaid Manor, and that therefore he, and all thoſe, whoſe Eſtate he had, have uſed to maintain a Chaplain in the Church of *A.* a Conſultation was pray'd.

First,

First, Becauſe it was not alledged, That the Church of *A.* was within the ſame Pariſh where the Manor was; and ſo it was no Conſideration to the Parſon, that was the Plaintiff.

Secondly, Becauſe it doth not extend to the Maintenance of the Chaplain, ſo long as he claims the Tithes, Time out of Memory, *&c.*

Thirdly, Becauſe the Defendant had not (as 2 *Ed.* 6. directs) prov'd the Maintenance of the Chaplain within the ſix Months, but only the Reſidue of his Suggeſtion; this being the principal Matter to make this Suggeſtion good.

Quære *if good.*

And a Conſultation was awarded *per Curiam*, upon this laſt Exception; and *Coke* ſaid it ſhall be granted for the other Exceptions alſo. 1 *Roll. R.* 2. *Sed Quære inde.* For it ſeems the Senſe of the Court was, That if the Suggeſtion of maintaining the Chaplain had been proved, the Preſcription had been allowed, as founded on a good Conſideration.

A whole Pariſh diſcharg'd upon a Cuſtom.

And as a Manor may be diſcharged of Tithes againſt the Parſon, upon the Account of a Penſion paid by the Lord, or Land given, ſo may a whole Pariſh or Hamlet be diſcharged of this or that Sort of Tithe, as of Wood, Hay, *&c.* upon a Cuſtom, That all the Parſons of the Church of *D.* Time out of Mind, have had ſuch Lands, Parcel of the Manor of *H.* in Recompence of this or that Sort of Tithe within the ſaid Pariſh or Hamlet, altho' all the Lands within the ſaid Pariſh, *&c.* do not at this Day belong to the

the ſaid Manor. See 3 *Cro.* 587, & 736. 2 *Cro.* 501.

And it is ſaid to be ſufficient for the Pariſhioners to alledge, That the Parſons have had ſuch Lands in Recompence of ſuch Tithes not pay'd within Memory, *&c.* And that it is not neceſſary to ſhew how or by what Title the Parſons had the Land: But if they had it in another Manner than in Satisfaction of Tithes, the Parſon himſelf ought to ſhew that. See *Moor* 911. *Proof, &c. v. ſupra.*

But note; the Courts of Common Law, not duly attending to the Reaſons of former Reſolutions, have ſomewhat varied from them in their later Judgments.

See 4 *Mod.* 341, 344. A Cuſtom to be exempted from the Tithes of Underwood uſed in a Pariſh for fencing Corn is good, but then you muſt ſhew that the Tithes of the Corn are paid by you to the Parſon; and *Ibid.* 336, 340. a Cuſtom *in non Decimando, &c.* may be good for a particular Thing, *&c.* but then you muſt ſhew that the Parſon has a ſufficient Maintenance beſides. *Vide poſt.* *Cuſtoms of diſcharge, &c.*

Where there is a Preſcription to be diſcharged of all Tithes of Hay-Ground, *viz.* of all the Meadow in the Pariſh, in Conſideration that the Parſon had certain Acres of Meadow to his own Uſe. Here, if any Arable Lands are converted into Meadow, the Preſcription ſhall not extend to diſcharge them; as was adjudged in one *Conyers*'s Caſe, cited in *Hutton* 58.

And as a whole Pariſh, ſo a private Perſon may pay a *Modus* for his Lands, or ſome Part thereof, *viz.* a certain Rent or Sum of Money *Modus by a private Perſon for his Lands, &c.*

Money, or other Conſideration, and by that Means be diſcharged from the Tithes ariſing on ſuch Lands. But this Rule is generally, if not always, to be obſerved, *viz.* That as a Layman cannot directly preſcribe *in non Decimando*, ſo to maintain a Preſcription *de modo Decimandi*, he muſt preſcribe to the doing or paying of ſomething Time out of Mind, to the Benefit of the Parſon, to whom Tithes in Kind were otherwiſe due and payable.

Conſideration to be good, and of Benefit to the Parſon.

Therefore when one preſcribed, That he ought to be diſcharged of Tithes, in Conſideration that he had uſed, Time out of Mind, to employ all the Profits of the Land in the Reparation of the Body of the Church, and to find all Neceſſaries for the Church; this *Modus* was adjudged not good, becauſe the Parſon had thereby no Recompence for his Tithes. But otherwiſe it would have been, if he had uſed with the Profits to repair the Parſon's Chancel; for that the Parſon, being otherwiſe charged with the Repair thereof, hath a Benefit thereby. See 1 *Roll. Abr.* 649, & 650.

So when one preſcribed to reap Corn, and to make it into Sheafs, and to ſet forth the Tenth Sheaf at his own Charges, and to cut his Hay, and to ſever it from the nine Parts, at his own Charges, in full Satisfaction of the Tithes of his Corn, Hay and Wool, it was adjudged inſufficient for the Wool; for the other two were due of Common Right; and ſo the Parſon had nothing for the Wool; and by Conſequence the Preſcription is a *non Decimandi* as to that, and therefore bad. See 13 *Co.* 45. See alſo 2 *Salk.* 656, 657.

And

A Rate to the Rector, &c. no Diſcharge. Quære.

And upon the ſame Reaſon the Court held, That a Preſcription to pay a Rate to the Rector, will be no Diſcharge of the Payment of Tithes to the Vicar. 3 *Bulſtr.* 220. And the Payment of five Shillings yearly to the Pariſh-Clerk, is no Conſideration of a Preſcription to be diſcharged of the Tithes due to the Parſon. 3 *Cro.* 11. yet a *Modus* paid to the Rector has been held a good Diſcharge againſt the Vicar for Tithes of Willows, *ante* 37.

Payment to one that has a Portion of Tithes, a good Diſcharge againſt the Parſon.

And where the Plaintiff in a Prohibition ſuggeſted, That the Prior of *N.* was ſeiſed of a Manor, and of the Tithes *ſimul & ſemel*, as of a Portion of Tithes, and that he 25 *H.* 1. granted the ſaid Manor and Tithes to one *F.* and his Heirs, rendring Rent; and that the Heirs of the ſaid *F.* afterwards granted Parcel of this Manor, with the Tithes, to one *S.* rendring five Shillings Rent; and ſo brings down a Title from the ſaid *S.* to the Plaintiff in the Prohibition, and concludes that the ſaid *F.* and all thoſe whoſe Eſtate, *&c.* did pay the ſaid Rent to the ſaid Prior, and ſince the Diſſolution, to the King and his Aſſignes, in Diſcharge of all Tithes. It was objected, That the Plaintiff here would infer a *Modus* by the Payment of the Rent to the Prior, *&c.* which will not do; for unleſs the *Modus* doth go to the Perſon, who by Law ought to have the Tithes, or for his Benefit, it is not good.

But it was anſwered, and agreed by the Court, That in this Caſe it doth appear, that there was a *Modus* in the Prior, which being received till it came to the Crown, it

continues good, though it be now paid to others. For *if a* Modus *be payable to him who hath the Right of the Tithes, though it be not the Parſon of the Pariſh*, it is well enough, eſpecially as it is here, being alledged to be a Portion of Tithes belonging to the Prior; ſo that it cannot be ſaid, That the Parſon had not *Quid pro Quo*. For he had nothing at firſt, and the Compoſition being made with the Prior, the Plaintiff is only to ſhew a Payment to him, and to thoſe who have his Right. See the Caſe of *James* and *Trollop*. 2 *Mod. Rep.* 320. and *Skinner's Reports* 51 and 239.

But in another Caſe, when for a Prohibition it was ſuggeſted, that the Dean and Chapter of *Carliſle* were ſeiſed of a Manor, whereof the Place whereout Tithes are demanded is Parcel; and that the Defendant againſt whom Tithes are demanded, is Copyholder in Fee of thoſe Lands, and that all the Tenants of that Manor had been diſcharged of the fourth Part of their Tithes of all the Lands, in what Place ſoever they did lie, paying ſo much to the Lords of the ſaid Manor for Quit-Rents; a Prohibition was denied; for *per Curiam*, It cannot be, that Lands held of other Lords, ſhould be diſcharged of Tithes by the Payment of this Rent. And it doth not appear that the Payment to the Lord was in any other Manner than as his Rent only. *Wilkinſon* v. *Richardſon*. 1 *Sid.* 258. and 1 *Keb.* 906.

Modus *void for Incertainty*, &c.

Alſo a *Modus* or Preſcription claimed thereon, ſhall be void for its Incertainty, &c.

&c. as a *Modus* to pay 4*s.* of every Day's plowing of Wheat, and 2*s.* for every Day's plowing of Barley, was held to be void for the Incertainty, it not being averred how much every Day's plowing did contain. 1 *Keb.* 612.

So a *Modus* payable on, *or about* ſuch a Day, is not good, for the Day ought to be certainly alledged. See *Blacket* and *Finney's* Caſe, *Trin.* 11 *Geo.* 1. *in Canc.* new Caſes in Law and Equity, 375, 376.

So if a Man preſcribe to pay one Penny, *or thereabouts*, for the Tithes of every Acre of Arable Land, this is not good by Reaſon of the Incertainty. See 2 *Roll. Abr.* 265. *Allen's* Caſe, *per Curiam.*

Alſo a *Modus* muſt be as certain as the Thing deſtroyed or loſt by it.

And therefore a *Modus* to pay 2*s.* in the Pound of the improved Rent, in Lieu of Tithes, is ill. See 2 *Salk.* 656, 657.

So if unreaſonable, &c.

And ſo it is, if the *Modus* claimed appears to be unreaſonable; as that all Perſons having Lands within ſuch a Town, but not inhabiting within the ſame Town, ſhall pay 4*d.* an Acre only, in Satisfaction of all Tithes, was held an unreaſonable Cuſtom. For that it gave greater Privileges to Foreigners, not inhabiting within the Town, than it did to the Inhabitants themſelves; which by Reaſon of their Reſiancy are obliged to greater Charges, towards Church Reparations, Ornaments, *&c.* See 1 *Lev.* 116. *Bawdry* v. *Buſhel.*

How a Cuſtom or Preſcription may be loſt by Time.

Alſo, after a Cuſtom or Preſcription (on a *Modus*) to be diſcharged of Tithes is

created by Continuance of Time, yet it may be afterwards loſt by Diſuſer, Nonpayment of the Conſideration, or otherwiſe; and in ſuch Caſe the Parſon may have his Tithe in Kind. For Cuſtom and Preſcription may be loſt, as well as gotten, by Time.

Not if Proof may be of it. But an Interruption of the Uſage for ſuch Time only, as doth not deſtroy the Poſſibility of making Proof that ſuch a Cuſtom or Preſcription has been, does not deſtroy ſuch Cuſtom or Preſcription; *per Coke.* 1 *Bulſt.* 240.

For otherwiſe a Leſſee might pay Tithes in Kind, where there is only a *Modus* due, and thereby bar his Leſſor of the Benefit of the *Modus* in After-Time, which ought not to be. 1 *Roll. Rep.* 176.

Of Mill's. Alſo a *Modus* may be loſt by the Alteration or Deſtruction of a Thing for which it was paid; as if there be a *Modus* to pay a certain Rate for the Tithe of a Mill, it may be loſt.

As if two Fulling-Mills be under one Roof, for which a Rate-Tithe has been paid, Time out of Mind, and thoſe Mills are afterwards altered and made into one Corn-Mill, the *Modus*, it is ſaid, is gone: And Tithe muſt be paid in Kind for this new Mill.

So if there be but one Pair of Stones in a Mill, and a *Modus* is to pay a certain Rate for them, and then another Pair of Stones is put into the ſame Mill, it is ſaid that Tithes muſt now be paid in Kind. See *Brownl.* 32.

So if one be discharged from the Payment of Tithes for two antient Corn-Mills, driven by Water, for a *Modus* of 6 *s.* 8 *d.* annually paid to the Parson; and the Water-course, which was accustom'd to run to the Mills, is diverted by the Owner of the Mills, and runs in another Place a little distant from the said Mills, and the Owner pulls down one of the said Mills, and re-edifies it upon the Stream in the new Course; he shall pay Tithes thereof, as for a new Mill, and the antient *Modus* shall not discharge it.

But if by the Continuance of Time, by the Act of God, the Water-course that was wont to run to the Mill is altered, and the Mills be therefore pull'd down and built on the new Stream, there the *Modus* shall continue, and he shall be discharged of Tithes for these new Mills, paying the said 6 *s.* 8 *d. per Cur.* See 1 *Roll. Abr.* 652.

See more concerning Tithes of Mills, *ante* Chap. 4.

Of Land altered.

And so it is, If a Man prescribe *in Modo decimandi* for Hay and Grass, in forty Acres of Land, and the Tenant converts it into a Hop-Garden, or into Tillage, the *Modus* is thereby destroyed. For when the *Modus* is Special, as for Hay and Grass, *&c.* only, there it will be destroyed by the Conversioo of the Land to other Uses. See 1 *Roll. Abr.* 651.

Of a Park, dispark'd, &c.

So if a *Modus* has been paid for a Park, Time out of Mind, and afterwards the Park is Disparked, and the Lands converted into Tillage, *&c.* if the *Modus* were general

for the Park, it is gone, when the Park is diſparked; but otherwiſe it is, if the *Modus* is for ſo many Acres of Land contained in the Park. 1 *Roll. Abr.* 651. and ſee *Noy* 148.

So if the Preſcription be to pay a Buck or a Doe out of the ſame Park, if it be after diſparked, the Preſcription is gone. *Hutton* 57.

And where a Preſcription is to pay a Shoulder of every Buck at *Chriſtmas*, if the Park be diſparked, Tithes in Kind ſhall be paid. *Per Popham.* 3 *Cro.* 476. See *Owen* 74. *Mo.* 909.

And where one had a Park, and was uſed to pay the Shoulder of a Deer for all Manner of Tithes, and the Park is diſparked, *quære* if he ſhall not pay Tithes in Kind. See 1 *Brownl.* 31.

So if the Preſcription be to pay 10 *s.* for the Deer and Herbage of a Park, and not for all the Park, and the Park is diſparked, and ſown with Corn, Tithes in Kind ſhall be paid.

Or if a Preſcription be to pay 10 *s.* and a Shoulder of every Deer, if it be diſpark'd, Tithes ſhall be paid in Kind, and not the 10 *s.* See *Moor* 909. adjudged. See *Parſons Law*, 248, 249.

Alſo when a Preſcription was to pay 2 *s.* yearly, and a Shoulder of every third Deer kill'd within the Park, *Winch* and *Warburton* held, That by the diſparking of the Park, the Preſcription, as to the Shoulders, was determin'd, and by Conſequence all the *Modus decimandi*; and then, that the Parſon

ſhall have Tithes in Kind; and that if the Park be revived, the Preſcription and *Modus decimandi* ſhall be revived alſo. *Modus, &c. revived.*

But in that Caſe *Nicholas* and *Hobart* held, That the Preſcription ſhould endure, ſaying, That the 2*s.* is clearly a *Modus decimandi*, which is certain, and the Diſparking doth not hinder the Payment of it, and the Shoulders are but caſual; and upon the diſparking, the Parſon ſhall loſe them, and recover in the Court Chriſtian, a Recompence for them, in Money; as if a Man will not ſet forth his Tithes, the Tithes themſelves ſhall not be recovered, but a Recompence for them. See for this, *Watſon* 513, 514. *Hob.* 39. *Godb.* 237. 1 *Roll. Abr.* 120. *Recovery in the Spiritual Court.*

But according to the former Caſes, the Preſcription is gone, and Tithes are to be paid in Kind; *quære.*

And yet it is clear, that if a *Modus* hath been to pay a certain Rate in Money for all the Tithes of ſuch a Park, the *Modus* ſhall hold, though the Park be diſparked. 3 *Cro.* 476. *Moor* 909. *Owen* 74. 2 *Bulſt.* 240. 1 *Roll. R.* 176. *Money in Lieu of Tithes.*

Or if the *Modus* be to pay a Buck and a Doe for all Tithes of ſuch a Park, this *Modus* ſhall continue, though the Park be diſparked; for though they are *Feræ Naturæ*, and ſo not Tithable in themſelves, yet they may be given for Tithes by Compoſition, and may be the Conſideration of a *Modus.* See *Noy* 148. *Hutton* 57. *Owen* 34. *Deer.*

And ſo, though Partridges and Pheaſants in a Garden are not Tithable, yet they may, by Compoſition, be paid in Lieu of Tithes, *Partridges, &c.*

and the Parſon ſhall not take them, but they ſhall be brought dead to him. And though in the Caſe of the Park, the ſame be diſparked, yet if the Payment of the Buck, *&c.* be not fixed to be had out of that particular Park, the Owner may give a Buck, *&c.* out of another Park, and the *Modus* will continue.

But where the *Modus* of the Buck, *&c.* is to be had out of that Park only, there, according to the Caſes *ſupra*, the Park being diſparked, the *Modus* is gone, and the Tithes in Kind are to be paid.

As in a Suit for Tithes of Corn growing in a Park diſparked, the Defendant pleaded a Cuſtom to pay a Buck in Satisfaction of all Tithes; and the Witneſſes proved a Buck paid yearly, but could not tell whether it was taken out of the ſaid Park or not; and the Jury were charged with this particularly; for if it were to be paid out of this Park only, then by diſparking the Park the Cuſtom is gone; but if it had been often and moſtly paid out of this Park, yet that will not alter the Cuſtom, but it may be paid out of any other Park, if the Cuſtom were to pay a Buck generally. See *Clayton's Rep.* 91. and *Parſons Law* 249.

Time of Preſcription ſixty Years.

Alſo the Payment of a Sum of Money, or other Thing in Lieu and Recompence of Tithes for ſixty Years, or thereabouts, is held to be a reaſonable Time to make a Preſcription. See *Co. Lit.* 114. *Dyer* 7, 9. *Cromp. Jur.* 77.

Wright's Caſe.

Note; the Caſe of *Wright* and *Wright*, as reported in 1 *Cro.* was thus: The Biſhop of *W.* be-

W. being ſeiſed in Right of his Biſhoprick of a Manor, preſcribed, That he, and all his Predeceſſors had held the ſaid Manor, and the Demeſnes thereof Time out of Mind, for him, his Farmers, Tenants for Years, or at Will, diſcharged and acquitted from the Payment of Tithes for thoſe Lands; the Biſhop made a Leaſe for Years of Parcel of the Demeſnes; the Farmer of the Rectory libelled in the Eccleſiaſtical Court againſt the Leſſee for Tithes, who pleads all this Matter in the Court there, and the Judge there refuſed to allow of the Allegation in Diſcharge of the Tithes. And on a Prohibition it was reſolved, *Biſhop's Leſſee.*

1. That where the Lands of a Biſhop are abſolutely diſcharged in his Hands by Preſcription, there the Demiſing it to a Layman could not make it chargeable with Tithes.
2. That a Spiritual Perſon may preſcribe *in non Decimando.*
3. That the Refuſal by the Eccleſiaſtical Judge to allow the Allegation in Diſcharge of Tithes, is (a Matter) not traverſable.

In like Manner it was adjudged in the Caſe of *Mordant* and *Cummins*, in 3 *Cro.* where the King being ſeiz'd of Lands, Parcel of the Foreſt of *B.* in Fee, in Right of his Crown, diſcharg'd of the Payment of Tithes, granted the Lands to the Earl of *Hartford* in Fee; and it was there held, that the Paten- *King's Patentee.*

tee ſhould be diſcharged of Tithes; and a Prohibition was granted in that Caſe.

Abby Lands 27 H. 8.

And yet in another Caſe, where it was ſurmiſed for a Prohibition, That the Prior of *B.* was ſeiſed of Lands Parcel of his Priory, and held them till the Diſſolution diſcharged of Tithes for his Farmers and Tenants for Life or Years, and that the Priory was diſſolved 27 *H.* 8. That the King was ſeiſed of the Lands, and ſhews the Statutes 31 *H.* 8. and 1 *Ed.* 6. and that the King died ſeiſed thereof, and that by mean Deſcents it came to *J. S.* and that the Plaintiff being his Tenant for Years, was ſued by the Parſon of *B.* for the Tithes of thoſe Lands: It was reſolved by the Court,

Quære *the Stat.* poſt.

That the Lands which came to the Crown by the Statute 27 *H.* 8. ſhould not be diſcharged from the Payment of Tithes, but ſhould pay the ſame, altho' the ſame Lands in the Hands of Religious Perſons or Houſes, were diſcharged from the Payment thereof.

Privilege only Perſonal. See Rep. Can. 399.

For that thoſe Privileges were perſonal Privileges, which were extinguiſhed by the ſaid Statute of Diſſolutions: And that there are not any Words in the ſaid Stat. 27 *H.* 8. to ſave the ſaid Privileges; and the Statute of 31 *H.* 8. being a Subſequent Law, had no Reſpect to thoſe Privileges. See *Sydown* and *Holme*'s Caſe in 3 *Cro.* and *Parkins* and *Hind*'s Caſe in 1 *Cro.*

And ſo it was adjudged in the Caſe of *Bolls* ver. *Atkinſon*, which, as reported in 1 *Lev.* 185. was thus: Debt on the Statute of *E.* 6. for Tithes, and on *nil debet*, a Special Verdict found, That the Abbot of *Abingdon*

bingdon was ſeized in Fee of Lands, being a Parcel of Meadow in *Oxford*, in Right of his Houſe, and that he and all Abbots, &c. his Predeceſſors, Time out of Mind, held it diſcharged of Tithes, and granted it to the College of *All-Souls* in *Oxford*. And if the College ſhould hold it diſcharged of Tithes, as the Abbot did, was the Queſtion. And it was argued for the Plaintiff, that this Preſcription was Perſonal, and that by the Alienation it was determined, and that ſo it would be, if he had aliened to another Eccleſiaſtical Perſon, though capable of the Pernancy of Tithes, as 35 *H.* 6. 56, 57. the Caſe of the *Hoſpitalers*; and much more when aliened to a Lay Perſon, not capable of Tithes; and they alſo cited 1 *Cro. Siddon* againſt *Holmes*, *Hob.* 5, &c. ——— And here they ſhall not be intended to be diſcharged by any Real Compoſition, not being pleaded to be ſo. But on the contrary it was argued, That the Land and the Tithes might be granted to the Abbot before the Council of *Lateran*; for before that Council, a Man might grant his Tithes to what Eccleſiaſtical Perſon he would. *Seld. Hiſt. of Tithes* 306, 307, 351. 7 *E.* 3. 5. 44 *E.* 3. And this Abby was founded by King *Ina* before the Conqueſt; and he might have the Lands and the Tithes by Purchaſe, and hold them by Way of Real Compoſition, which differs from Perſonal Diſcharges, by Way of *Bull*, *Order*, &c. which are Perſonal. 1 *Cro. Mordant* againſt *Commins*. And a College is capable of an Appropriation, and ſo is Spiritual, as to the taking of Tithes. 7 *E.* 3.

An Abbot, Time out of Mind, held Lands diſcharged of Tithes. The Alienee ſhall pay Tithes, for it ſhall be taken as a Perſonal Preſcription, and not a Real Compoſition. *See* 1 Sid. 320. 1 Keb. 162, *and* 2 Keb. 28, 60, &c. *S. C.*

Quare

Quare Impedit 19. 5 *Co.* 10. of an Union· 6 *H.* 7. 13. 10 *H.* 7. 19. 11 *H.* 4. *Dyer* 255. *a.* of which no Lay Corporation is capable. And it was argued twice, *viz.* in *Trin.* & *Hill.* 18 & 19 *Car.* 2. In which Term, after the ſecond Argument, the Court took Time 'till another Day in the ſame Term, when the Opinion of the Court was delivered by the Chief Juſt. *Keeling* alone, as a Caſe wherein they all clearly agreed, That it cannot be intended a Diſcharge, by a Real Compoſition, it not being pleaded, nor found by the Jury to be ſo; but was a meer Preſcription, and Perſonal to the Abbot, and did not run with the Land; and the Judgment was given for the Plaintiff.

Privilege of Templars Lands only Perſonal, and not veſted in the K. by 31 *or* 32 H. 8.

Alſo in an Action of Debt on the ſaid Stat. 2 *Ed.* 6. for not ſetting forth of Tithes, the Caſe was: The Lands for which the Dicharge was claimed, were Parcel of the Poſſeſſions of the *Knights Templars*, whoſe Lands were annexed to the Priory of St. *John* of *Jeruſalem*; and the *Templars* had a Special Privilege to be diſcharged of Tithes of thoſe Lands, which *propriis manibus excolunt*. By a Special Act of Parliament 32 *H.* 8. the Poſſeſſions of the ſaid Priory of St. *John*'s were given to the King by general Words, *in tam amplis modo, &c.* as the Abbots, *&c.* held them; and it was *Reſolved*, That the Defendant ſhould not be diſcharged, nor have the Privilege. For by the Common Law, a Lay Perſon was not capable of ſuch a Privilege; and the King could not have the Benefit of the Privilege, 'till the Stat. 31 *H.* 8. But that Statute

tute extends only to ſuch Poſſeſſions as came to the King, by Surrender, and ſhould be veſted in him by that Act; and doth not extend to ſuch Poſſeſſions as are veſted in him by any other Act. (*Quære.*) And therefore theſe Lands, being given to him by another Special Act of Parliament, are not diſcharged of Tithes. See 1 *Cro. Parkins* and *Hind*'s Caſe; and 2 *Cro. Cornwallis* and *Spurling*'s Caſe.

Privilege quid.

And note; a Privilege is ſaid to be an Exemption derived from the ſupream Authority, upon good Conſideration, and refers ſometimes to Perſons, and ſometimes to Places. And although by the Stat. 2 *Ed.* 6. *c.* 13. None are to pay Tithes for Lands privileged, or lawfully diſcharged from the Payment thereof; yet it is ſaid ſuch Privileges are meerly Perſonal, and do not exempt ſuch Lands from the Payment of Tithes, longer than they are in the Hands of privileged Perſons. See *Rep. Canon.* 436.

Where a Monaſtery was ſeized

But although ſuch Privilege of being diſcharged of Tithes, or other Preſcription *de non Decimando*, when annex'd to a Spiritual Corporation, will periſh by a Diſſolution of ſuch Corporation, and the coming of the Lands to Lay Hands, without the Aid of direct Words in an Act of Parliament, for continuing of ſuch Privilege in Lay Hands, as before is ſhewn: Yet upon a favourable Conſtruction of the Stat. 31 *H.* 8. Preſcription is of that Force, that where any of the Lands belonging to Monaſteries, *&c.* which were diſſolved by that Statute, were in ſuch Pariſhes, whoſe Churches were appropriated

both of Lands and Rectory ſimul & ſemel, &c.

to

to any of the ſaid Monaſteries, ſo that the Monaſtery was ſeized of the ſaid Lands and Rectory *ſimul & ſemel*, Time out of Mind, and paid no Tithes within the Memory of Man, for the Lands, ſuch Lands ſhall be diſcharged of Tithes, by Reaſon of ſuch perpetual *Unity of Poſſeſſion*, as has been divers Times adjudged. See 2 *Co.* 47, 48. 4 *Leon.* 47, *&c.*

Unity of Poſſeſſion.

However, if in this Caſe of Unity of Poſſeſſion, the Farmers of the Demeſns had paid Tithes, *&c.* to the Abbot, *&c.* when ſuch Lands were uſed or occupied by their Tenants or Farmers, either at Will, or for Years or Life, there the Intendment of the Law, notwithſtanding ſuch Unity of Poſſeſſion, (which ought to be uninterrupted Time out of Mind) will not hold Place. See 1 *Jon.* 412.

To be Time out of Mind,

And therefore if an Abbot had made a Leaſe for Years of ſuch Lands, but a Year before the Diſſolution, although that the Leaſe was made void by the Statute, yet this Leaſe ſhall deſtroy the Unity of Poſſeſſion, ſo that it may not be pleaded in Diſcharge of the Tithes; but it is admitted, That it would have been otherwiſe, if there had been an abſolute Nullity of the Leaſe *ab initio*, without a conſequent Statute to make it void; *per Cur.* 2 *Bulſtr.* 67. *For there was no Interruption.*

and without Interruption, &c.

And in a like Caſe, *Popham* ſaid, That a Unity in Eſtate, and not in Occupation of the Land and Rectory, at the Day of the Diſſolution, by the Abbot, *&c.* is not any Diſcharge of the Tithes within the Statute:

Unity in Eſtate, and not in Occupation, no Diſcharge.

No

No, not tho' the Land was in Leaſe but for one Year at the Time of the Diſſolution; and altho' there had been an Unity of Poſſeſſion Time out of Mind, *&c.* until the laſt Year, or other ſhort Time, before the Diſſolution. See *Moor* 528. and 3 *Cro.* 584.

Part of Tithes reſerved on a Leaſe, and Part diſcharged.

And accordingly, when the Caſe was, That an Abbot and his Predeceſſors had been ſeized of a Rectory, and of Lands within the ſame Pariſh, Time out of Mind, *&c.* until the 26 Year of *H.* 8. at which Time the Abbot made a Leaſe of the Lands for ſixty Years, and thereby demiſed all Tithes, renewing, ariſing, *&c.* upon the ſaid Lands, *viz.* Hay, Corn, *&c. reddendo perinde* certain Corn Rent; and by the ſame Indenture, it was covenanted, That the Leſſee ſhall not ſet forth the Tithes of the Hay and Corn to the Leſſor, and his Succeſſors, but that the Leſſee, his Executors and Aſſigns, ſhall ſet forth the Tithe of Wool and Lamb to the Leſſor, *&c.* and ſmall Tithes to the Vicar; and afterwards in 31 *H.* 8. the ſaid Abby was diſſolved, and in the ſame Year the Statute was made, which Enacts, *That the Purchaſer*, (of the King) *ſhall hold it diſcharged in the ſame Manner as it was in the Hands of the Abbots, &c.*

No Diſcharge.

In this Caſe it was adjudged, (when the Lands and the Tithes had ſeveral Proprietors,) That this *Unity of Poſſeſſion* joined with the other Circumſtances, ſhall not diſcharge the Lands from the Payment of Tithes: For Firſt, there is a Demiſe of the Lands, and of the Tithes alſo, which argues, that they

they were due and payable in themſelves. Secondly, Here is a Proviſion for the Payment of other Tithes. Thirdly, Here is a Covenant, That the Tithes leaſed ſhall not be ſet forth: And, Fourthly, It is found, That Lamb and Wool were paid in Kind, and a Payment of Part of the Tithes is a Seizin of all. From whence it follows, That the Lands had never been diſcharged by any Real Compoſition; and ſo conſequently that, tho' the Tithes of Corn and Hay were not paid during the *Unity*, yet for that they were paid ſometime before the Diſſolution, therefore of Right they were payable. See 2 *Cro.* 452. *Dobitoft* v. *Curteen.*

So, tho' the Leaſe expired before the Diſſolution.

And ſo it is, If Tithes were not paid Time out of Mind, by any Houſe of Religion, and they leaſed the Land for Years, and received Tithes of the Leſſee, and the Leaſe expired two Years before the Diſſolution of the ſame Houſe: 'Tis ſaid, the King himſelf ſhall not be diſcharged of the Payment of Tithes by the ſaid Stat. 31 *H.* 8. by *Coke* and *Walmſley* againſt *Warburton* and *Foſter.* See *Priddle* and *Napper's* Caſe, 2 *Co.* 48. and 2 *Brownl.* 26.

Plea and Iſſue.

And ſo if the Farmers have paid Tithes before the Statute, the ſame may be pleaded, and Iſſue may be taken thereupon; but if the Lands were always occupied by the Abbot, or demiſed over, and no Tithes paid thereof before the ſaid Statute, there the Land is diſcharged from the Payment of Tithes. See 2 *Co.* 48. 11 *Co.* 14. *Hob.* 298.

Alſo

Alſo if Land, that was diſcharged by *Unity of Poſſeſſion*, came to the King by 31 *H.* 8. then, by Force of the Branch of Diſcharge therein, (which ſee hereafter) a general Allegation, That ſuch Prior held the Land at the Time of the Diſſolution of the Priory, diſcharged of the Payment of Tithes, without ſhewing how, is ſufficient. See 2 *Co.* 48. and *Moor* 420. S. C. *A general Allegation of Diſcharge, when ſufficient or not.*

And yet it has been held, That if a *Unity of Poſſeſſion* by way of Diſcharge, be alledged generally, without ſhewing how, or adding that it was perpetual, it is not ſufficient. See *Hob.* 298. 11 *Co.* 14. by *Gawdy* againſt *Popham* and *Fenner*. See alſo *Moor* 420.

But in *Priddle* and *Napper*'s Caſe, 11 *Co.* 14. It was asked, What if an Appropriation was made in the Times of *Ed.* 4. *H.* 6. *H.* 5. *H.* 4. *R.* 2. *Ed.* 3. *&c.* and yet in Law within Time of Memory, and an Unity had continued from the Time of the Appropriation until the Diſſolution, and Tithes were never paid by the Abbots, *&c.* or their Farmers, ſhould not the Statute extend to theſe Caſes? And it was anſwered, No, upon the Point of *Unity*; for if he will have Aid of the Act of 31 *H.* 8. the Unity, as hath been ſaid, muſt be perpetual. *Upon the Point of Unity.*

And yet in ſuch Caſe, there may be alledged the Branch of the ſaid Act of 31 *H.* 8. concerning the Diſcharge of Payment of Tithes, *&c. viz.* That the Abbots, *&c.* Time out of Mind, *&c.* until the Diſſolution, have held the Lands diſcharged of Tithes, and ſo preſcribe *in non Decimando* (as he well may) as at the Common Law, and *Preſcription as at Common Law.*

and give ſuch Evidence that may prove it; and by this Means, if in Truth the Lands are diſcharged, he hath ſufficient Remedy to relieve himſelf. But if the Abby or Priory were founded within Time of Memory, *i. e.* ſince 1 *R.* 1. there he cannot preſcribe at all. See 11 *Co.* 14. *Priddle* and *Napper*. See alſo 2 *Keb.* 459. *Engliſh* and *Jones*.

Defendant confeſs'd the Unity, but pleaded to the Foundation.

So when Unity of Poſſeſſion, Time out of Mind, *&c.* was ſuggeſted, in order to obtain a Prohibition to ſtay a Suit in the Spiritual Court for Tithes, the Defendant pleaded, That the Abby to which, *&c.* was founded 5 *Ed.* 1. (which is within the Time of Memory) and confeſſed the Unity from the Time of the Foundation; and *per Curiam*, this is a good Plea in Bar to avoid the Unity, and that it was not needful to traverſe the Preſcription; for the ſhewing the Foundation of the Abby to be after Time of Memory, is a ſufficient confeſſing and avoiding of the Unity.

Preſcription Traverſable.

But if the Defendant encounter the Suggeſtion of *perpetual Unity*, and will ſhew, that the Demeaſns before the Stat. and in the Time of the Abby, were in the Hands of Farmers, *&c.* there he ought to traverſe the Preſcription: For altho' the Poſſeſſion was chargeable in other Hands; yet as to the Fee-ſimple, which is in the Abbot, it is a Diſcharge in Right. See *Telv.* 31. where the Defendant traverſed the Unity at the Time of the Diſſolution; and thereupon the Plaintiff demurring, *Fenner* and *Clench* Juſtices (the others being abſent) held the Traverſe

Traverſe to be good: But if the Diſcharge had been pleaded generally by Preſcription, and not by Reaſon of Unity, then the *Preſcription* ought to have been anſwered, and not the *Unity*: And it was ſaid, That *Trin.* 34 *Eliz.* between *Calmady* and *Wyther*, it was ſo ruled; but it ſeems the Principal Caſe was adjourned. See 3 *Cro.* 584. *Button* v. *Long*.

Preſcription, and not the Unity.

Neither will a Preſcription *de non Solvendo*, in the Caſe of *Unity*, avail any thing, if the *Union* was not juſt; for if the Abbots, *&c.* have held by Abuſe and Wrong, Time out of Mind, *&c.* the ſame is no Unity within the Statute. See 11 *Co.* 14 *b.* *Moor* 46. and ſo it is, if the Abbot, *&c.* did hold the Lands and the Tithes in ſeveral Rights.

The Union to be juſt, &c. Vide infra.

And therefore where the Caſe was, That an Abbot had a Manor within the Pariſh of *D.* and a Compoſition was made betwixt the Parſon of *D.* and the ſaid Abbot, That the Parſon ſhould have yearly certain Loads of Wood out of thirty Acres of the ſaid Manor, for, and in Recompence of, all the Tithes of Wood there, and afterwards the Parſonage was appropriated to the ſaid Abbot; and then the Houſe was diſſolved, and the Manor granted to one, and the Rectory to another. It was there holden, That the Portion of Tithes was revived, for he had them, (*i. e.* the Manor and the Tithes) in ſeveral Rights: And in that Caſe, *Manwood*, Ch. Baron, and *Perriam* Juſt. to whom the Caſe depending in Chancery was referred, concerning the Diſcharge of Tithes by Unity of Poſſeſſion, delivered their Opinions, That

Land and Tithes held in ſeveral Rights.

Where Unity is no Diſcharge.

ſuch an Unity is no Diſcharge within the ſaid Statute. See 1 *Leon.* 355.

Where Tithes were ſuſpended, &c.

So where an Abbot had a Parſonage appropriate in *D.* which was diſcharged of Tithes, and afterwards the Abbot purchaſed Part of the Lands, ſo that the Tithes were ſuſpended during the Poſſeſſion of the Abbot; but after that the Abby was ſurrendred into the Hands of the King in the thirtieth Year of *H.* 8. and afterwards the ſame Poſſeſſion was given to the King by the Stat. 31 *H.* 8. as they were in the Hands of the Abbot: The Opinion of Mr. *Plowden* was, That the Lands, ſo purchaſed by the Abbot before the Surrender, were not diſcharged of Tithes by the ſaid Statute. For that no Lands are diſcharged by the Statute, but ſuch Lands (only) as were lawfully diſcharged in Right by Compoſition, or other lawful Means; and the Lands in this Caſe were not diſcharged in Right, but only ſuſpended during the Poſſeſſion of the Abbot in his own Hands; and ſo he ſaid it is when the Land is purchaſed by one, and the Parſonage by another, the Right of Tithes is renewed, and the Lands are to be charged as before the Purchaſe of the Abbot: And ſo it had been adjudged. See *Godbolt pa.* 1.

Union, no Diſcharge of the Tithes of Copyholds.

Alſo when upon a Prohibition the Surmiſe was, That the Land, out of which the Tithes were demanded, was Copyhold, Parcel of a Manor of which a Prior was ſeized in Fee, and was alſo *Parſon imparſonee*, and that by this *Union* the Tithes were Extinct, it was held, that the Surmiſe was not good: For that the *Union* was no Diſcharge of the Tithes

of

of the Copyholders. See *Brunker's* Caſe, *Moor* 219. *Rep. Canon.* 399. And ſo *Popham* held in *Benton* and *Trot's* Caſe, *Moor* 528.

Originally this *Union* was, where an Abbot, Prior, *&c.* Time out of Mind, had been ſeized of Lands in themſelves, and alſo of the Rectory of the Pariſh where ſuch Lands did lie; ſo that the *Unity* of the Parſonage to which the Tithes were payable, and of the Lands which ſhould pay the Tithes, either by Appropriation, or otherwiſe; and ſo that both the Parſonage and Lands were both in the Hands of the ſame Religious Perſons; this was called a Unity of Poſſeſſion, and was, as aforeſaid, a Diſcharge from the Payment of Tithes, becauſe the ſame Perſons that had the Lands, having alſo the Parſonage, they could not pay Tithes to themſelves. *Original of Unions.*

But note; tho' by ſuch Union the Perſons ſo poſſeſs'd, were diſcharged from the Payment of Tithes, yet the Lands were not abſolutely diſcharged of the Tithes; for upon any Diſunion that might happen, the Payment of Tithes again revived; ſo that the *Union* only ſuſpended the Payment, but was no abſolute Diſcharge of the Tithes themſelves; and therefore ſuch *Union* is not to be pleaded as a Diſcharge from Tithes, but only as a Diſcharge from the Payment of Tithes. See *Hob.* 44. and 297. *Ratio of Non-Payment.* *No abſolute Diſcharge.*

And ſuch Unity had been often reſolved to be a good Diſcharge from the Payment of Tithes before the Statute 31 *H.* 8. See 2 *Inſt.* 955. *Moor* 46, 47. *Cro. Jac.* 608. *Before Stat.* 31 H. 8.

Contra since that Statute. But now, ſince the ſaid Statute 31 *H.* 8. ſuch a *Unity* of Poſſeſſion of Lands in the ſaid Religious Houſes and Perſons, ſhall be an abſolute Diſcharge of Tithes to the King's Patentee, *&c.* for ſuch Lands as came to the Crown by that Statute.

Qualities of a Union on the Statute. But then the Union upon the ſaid Statute muſt appear to have had theſe Four Qualities, *viz.* It muſt have been *Juſta, Libera, Æqualis & Perpetua*, as we have before in part ſhewn.

1. Juſta. It muſt have been *Juſta, i. e.* claimed by Right, and good and lawful Title, and not by Diſſeiſin, or other Tortious, unjuſt, or unlawful Acts; for ſuch an Union would not have been a good Diſcharge within the Statute. *Vide ante.*

2. Æqualis. It muſt have been *Æqualis, i. e.* There muſt have been a Fee-Simple both in the Lands and in the Tithes, as well of the Lands upon which the Tithes are, as of the Parſonage, or Rectory: For if thoſe Religious Perſons had held but by Leaſe, that had not been ſuch a Unity as the Statute intended.

3. Libera. It muſt have been *Libera, i. e.* Free from the Payment of any Tithes in any Manner; for if the Abbots, *&c.* or their Farmers, or their Tenants at Will or Years, had paid any manner of Tithes before the Diſſolution, it may be alledged as a ſufficient Bar to avoid the *Unity*, pleaded in Diſcharge of Tithes.

4. Perpetua. It muſt have been *Perpetua*, Time out of Mind, That ſuch Religious Houſes were endowed, and ſuch Religious Perſons muſt have

have had in their Hands both the Rectory, and the Lands united perpetually, and without Interruption, before the Memory of Man, or (as it ſeems, according to the Rule of the Common Law) before the 1ſt Year of *R.* 1. diſcharged of Tithes. See *Hob.* 300. 11 *Co.* 44. *b.* 14. *b.* For if by any Records, or antient Deeds, or other Legal Evidence, it can be made to appear, That either the Lands, or the Rectory came to the Abby ſince the ſaid firſt Year of *R.* 1. ſuch Union cannot be ſaid perpetual. See *Hob.* 298, 306, 311, *Moor* 46, 47, 528. *Dyer* 349. *Cro. Jac.* 608. 2 *Inſt.* 655.

Diſcharge by Preſcription, &c.

And yet, if it be an antient Appropriation, as in the Time of *Ed.* 4. or before, altho' the Lands cannot be diſcharged of Tithes upon the Score of a perpetual Unity, by 31 *H.* 8. yet they may be diſcharged from the *Payment of Tithes*, by way of Preſcription, if in Truth the Lands have been ſince that Time diſcharged from the Payment of Tithes.

Unity not perpetual, the Diſcharge Temporary.

Alſo it appears, That at the Common Law, there might have been an *Unity of Poſſeſſion* different from the former, and which ſhall likewiſe Diſcharge from the *Payment of Tithes*, but ſuch Diſcharge is only *pro tempore*, and therefore, tho' it be an *Unity of Poſſeſſion*, yet it is not a *perpetual Unity* in the Senſe aforeſaid.

As, if a Parſon of a Church purchaſes a Manor within his Pariſh, by this Purchaſe, and the Unity of Poſſeſſion thereupon, the Manor which before was Tithable, is now become *non Decimabilis*, becauſe the Parſon

cannot pay Tithes to himſelf; but if he makes a Leaſe of his Parſonage and Rectory to a Stranger, the Parſon himſelf ſhall pay Tithes of his Manor to his Leſſee; and ſo if the Parſon makes a Feoffment of his Manor, the Feoffee ſhall pay Tithes to the Parſon. *Dier* 43. *Rep. Cannon.* 455.

So that to make a Preſcription, it is not only neceſſary to ſuppoſe a Bull or Grant, or a *Modus*, or Real Compoſition, but alſo a Unity of Poſſeſſion properly ſo called. *i.e. Juſta, Æqualis, Libera & Perpetua*; as before is ſhewn.

CHAP.

CHAP. VII.

Of the ſeveral Statutes for diſſolving Abbies, &c. and veſting their Lands in the King, and what Lands are diſcharged from Tithes by theſe Acts reſpectively, viz. 27 H. 8. c. 28. *of the leſſer Monaſteries;* 31 H. 8. c. 13. *of the greater Monaſteries;* 32 H. 8. c. 24. *of the Hoſpitals of St.* John of Jeruſalem; 37 H. 8. c. 4. *and* 1 Ed. 6. c. 14. *of College and Chantery Lands, &c. And alſo* 2 & 3 Ed. 6. c. 13. *as to Barren Lands improved, Derelict Lands, Fenny Lands, Thorney Lands, &c.*

A Recapitulation of the former Chapter of Lands diſcharged at Common Law.

IN the former Chapter we have mentioned ſeveral Species of Lands to have been diſcharged of Tithes by the Common Law, by Reaſon of ſome Accident or Quality, annext to, or inherent in them. Such as Antient Demeſne Lands, Barren Lands, Foreſt Lands, Derelict Lands, Extraparochial

Lands, &c. For all theſe (except Barren Lands) never came under Eccleſiaſtical Juriſdiction; and conſequently (and for other Reaſons before-mentioned) were not originally ſubject to the Payment of Tithes.

No other now privileged, but by Preſcription or Act of Parliament.

We have likewiſe ſhewn, That whatever Lands (not exempted by the Common Law) as were formerly in the Hands or Poſſeſſion of any of thoſe Orders, who claimed to be privileged from the Payment of Tithes, either by the Pope's Bull, or by any Eccleſiaſtick Canon or Conſtitution (as the *Ciſtertians*, *Templars*, *Hoſpitalers* and *Præmonſtratenſes*) or were otherwiſe exempted by Reaſon of any *real Compoſition*, or *perpetual Unity* of Poſſeſſion, &c. cannot now claim any Benefit from ſuch Privileges or Exemptions, but only as they are ſupported by Cuſtom or Preſcription, or have been allowed by particular Acts of Parliament.

And as to Exemptions or Diſcharges, by Reaſon of Cuſtom or Preſcription, Real Compoſitions, and Unities of Poſſeſſion, we have therein ſomewhat largely diſcourſed, and ſhewn the Nature, Qualifications and Incidents of each reſpectively. It remains therefore, as the Subject Matter of this preſent Chapter, to ſhew what Lands have been diſcharged of Tithes by Acts of Parliament, and how and in what Manner they are ſo diſcharged.

What Lands were diſcharged by Act of Parliament.

Now the Lands ſo diſcharg'd were principally ſuch as belonged to the ſeveral diſſolv'd Abbies, Priories, Monaſteries, Nunneries, Chaunteries, Colleges, or Free Chapels, and other (Religious) Houſes, Orders and Societies.

But

But note; all ſuch Lands are not diſcharged of Tithes, and ſome Lands (as Barren Lands, &c.) have only a Temporary Diſcharge, as hereafter will appear.

Now the Statutes which diſſolved Abbies, Priories, Monaſteries, &c. and veſted their Lands in the Crown, &c. are generally ſaid to be Five, *viz.* Stat. 27 *H.* 8. *c.* 28. Stat. 31 *H.* 8. *c.* 13. Stat. 32 *H.* 8. *c.* 24. Stat. 37 *H.* 8. *c.* 74. and Stat. 1 *Ed.* 6. *c.* 14. All which do generally provide, That the Lands of the Abbies, Priories, &c. thereby diſſolved, ſhould be in the King, in as large and ample Manner as the Abbots, &c. then held the ſame, in Right of their Houſes; which one would think from a natural Conſtruction would infer, That wherever the Lands were freed or diſcharged from Tithes, in the Hands of the Abbot, &c. *à fortiori* they ought to be ſo diſcharged in the Hands of the Crown, and from the Words of the Stat. 27 *H.* 8. this ſeems clearly to have been the Senſe and Intention of the Law-Makers of that Statute, though our Law-Expoſitors have ſince been of a different Opinion. I ſhall therefore give the Reader the very Words of the ſaid reſpective Statutes, as far as they relate to the Subject of this Chapter, with the ſeveral Caſes which have been adjudged thereupon; and refer both to all *impartial Judgments*.

What Statutes diſcharged Tithes.

The ſaid Stat. 27 *H.* 8. *c.* 28. enacts, 'That his Majeſty ſhall have and enjoy to 'him and *his* * *Heirs for ever*, all and ſingu-

Stat. 27 H. 8. *c.* 28. *See* Raſtall, Stat. 267. *b.* 268. *a.*

* Note; *The Word* Heirs, *by a legal Conſtruction, implies* Aſſigns, &c.

lar

'lar ſuch Monaſteries, Priories, and other 'Religious Houſes of Monks, Canons and 'Nuns, of what Kinds of Diverſities of Ha-'bits, Rules or Orders ſoever they be called 'or named, which have not in Lands, Tene-'ments, Rents, *Tithes*, *Portions*, and other 'Hereditaments, above the clear yearly Va-'lue of 200 *l.* and in like Manner ſhall have 'and enjoy all the Sites and Circuits of 'every ſuch Religious Houſes, and all and 'ſingular the *Manors*, *Granges*, *Meſes*, '*Lands*, *Tenements*, *Rents*, Reverſions, 'Services, *Tithes*, *Penſions*, Churches, Cha-'pels, Advowſons, Patronages, Annuities, '*Rights*, *Conditions* and other Hereditа-'ments appertaining or belonging to every 'ſuch Monaſtery, Priory or Religious Houſe, 'not having as aforeſaid, above the ſaid 'clear yearly Value of 200 *l.* *In as large and* 'ample Manner, *as the Abbots*, *Priors*, *Ab-'beſſes and other Governours of ſuch Monaſte-'ries*, *Priories and other Religious Houſes now* 'have, *or ought to have the ſame in Right of* 'their *Houſes*. And that alſo his Highneſs 'ſhall have to *him and to his Heirs*, all and 'ſingular ſuch Monaſteries, Abbies and Pri-'ories, which at any Time, within one 'Year next before the making of this Act, 'have been given and granted to his Majeſty 'by any Abbot, Prior, Abbeſs, or Prioreſs, 'under their Covent, Seal, or that other-'wiſe have been ſuppreſſed or diſſolved, 'and all and ſingular the Manors, Lands, 'Tenements, Reverſions, *Tithes*, Penſions, 'Portions, Churches, Chapels, *Advowſons*, 'Patronages, *Rights*, Entries, Conditions,

'and

'and all other *Intereſts* and *Hereditaments* 'to the ſame Monaſteries, Abbies and Pri- 'ories, or to any of them appertaining or 'belonging, to have and to hold, all and 'ſingular the Premiſſes, with all their 'Rights, Profits, Juriſdictions and Com- 'modities unto the King's Majeſty, and *his* 'Heirs and Aſſigns for ever, to do and uſe 'therewith his and their own Wills, to the 'Pleaſure of Almighty God, and to the 'Honour and Profit of the Realm.

And here Aſſignes *are expreſſed.*

And further enacted, 'That all and 'every Perſon and Perſons, and Bodies Po- 'litick, which now have, or hereafter ſhall 'have any Letters Patents of the King's 'Highneſs of any of the Scites, Cir- 'cuits, *Manors*, *Lands*, *Tenements*, *Rever- 'ſions*, Services, *Tithes*, *Penſions*, *Portions*, 'Churches, Chapels, Advowſons, Patron- 'ages, *Tithes*, Entries, Conditions, Inte- 'reſts, or other *Hereditaments*, which ap- 'pertained to any Monaſteries, Abbies or 'Priories *heretofore given* or granted to the 'King's Highneſs, or otherwiſe ſuppreſſed 'or diſſolved, or which appertaineth to any 'of the Monaſteries, Abbies, Priories, or 'other Religious Houſes that ſhall be ſup- 'preſſed or diſſolved by the Authority of 'the Act, ſhall have and enjoy the ſaid 'Scites, Circuits, Manors, Lands, Tene- 'ments, Rents, Reverſions, Services, *Tithes*, 'Penſions, *Portions*, Churches, Chapels, Ad- 'vowſons, Patronages, *Tithes*, Entries, Con- 'ditions, Intereſts, and all other Hereditaments contained and expreſſed in their 'Letters Patents now being thereof made,

'and

'and to be contained and ſpecified in any 'Letters Patents hereafter to be made, ac- 'cording to the Tenor, Purport and Ef- 'fect of any ſuch Letters Patents'. *See the Act at large.*

By the expreſs Words of this Statute, not only all the Manors, Granges, Lands and Tenements, but alſo all the *Tithes*, *Penſions* and Portions of Tithes of ſuch Monaſteries, *&c.* as were not above the yearly Value of 200 *l.* are given to the Crown in as large and ample Manner as the Abbots, *&c.* had or ought to have the ſame in Right of their Houſes. And by the next ſubſequent Clauſe, the King's Patentee is to have not only the Manors, Lands and Tenements, but alſo the Tithes, Penſions, Portions, and all other Intereſts, according to the Purport and Effect of the Grant.

But notwithſtanding the Extenſiveneſs of the Words in this Act, That the King, his *Heirs* and *Aſſigns*, ſhould have thoſe Lands in *as large and ample Manner* as the Abbots, Priors, *&c.* yet it was reſolved in the Caſe of *Sydown* and *Holme*. *Cro. Car.* 424. and 1 *Jon.* 370, 373. *That ſuch Privilege as the Abbots*, &c. *had of being diſcharged of Tithes, was not preſerved by theſe general Words.* So great an Influence had the Authority of the Clergy at that Time, over the Judges of our Law, as to induce a Judgment contrary to the expreſs Words, as well as the Spirit and Intent of that Act of Parliament; and the like Motive, or ſome other Principal, reſtrictive of the King's and Subjects Rights, hath alſo induced ſome later Judges

to

to be of the like Opinion. See 1 *Sid.* 320. 1 *Lev.* 185. 2 *Keb.* 28, 175, 472.

And to the ſame Purpoſe we find a late Author (a Clergyman) arguing, that notwithſtanding the ſaid Statutes 27 & 31 *H.* 8. *&c.* no Diſcharge of Tithes (I ſuppoſe he means in the Hands of a Layman) is now good, by the Aid of the ſaid Statutes, neither by Privilege nor by Preſcription, nor by Real Compoſition. To prove which, he cites the ſaid Caſe of *Sydown* and *Holm*, which I conceive does not clearly warrant his Opinion. Watſon, p. 517.

Prohibition. In a Prohibition a Surmiſe was, That a Prior of a Priory diſſolved by the ſaid Stat. 27 *H.* 8. held the Lands (for which the Tithes were demanded) diſcharged therefrom, Time out of Mind, for himſelf, his Fermers and Tenants for Life or Years. Two Points are moved. *Firſt*, Whether the Prior's Preſcription *in non Decimando* was determined by the Diſſolution of the Priory, or ſtill remained to the King, without the Aid of the Statutes 27 *H.* 8. & 31 *H.* 8. *c.* 13. And to this Point it was argued:

That in Regard the Land hath been diſcharged in the Hands of Spiritual Perſons, Time out of Mind, who were admitted to be capable of ſuch Diſcharge, it may be well intended to have been originally ſo by Compoſition Real; and then it ſhall go with the Land, as 8 *E.* 4. 14. and *F. N. B.* 41. where it is ſaid, That a Lay Perſon may hold Lands diſcharged of Tithes by Compoſition, and thereon have a Prohibition; and much more a Spiritual or Mix'd Perſon (as *Compoſition Real.*

(as the King) and then it ſhall go with the Land; and it was alſo ſaid, That ſuch Preſcription *de non Decimando* being fixed in a Spiritual Perſon, by the Diſſolution, came to the King, being *Perſona mixta*, and ſo to his Patentee. And of this Opinion, in the whole, ſeemed *Croke*, Ch. Juſt. and though in ſome Particulars, *Brampſton*, *Jones* and *Barkley* held the contrary, yet they agreed that ſuch Compoſition Real, in the Caſe of a Layman, if it may appear, ſhall be a good Diſcharge, and ſhall go with the Land. But becauſe a Spiritual Perſon may be diſcharged by Grant, as well as by Compoſition Real, it ſhall be intended *in Favour of the Church*, to be by the moſt general Courſe. (Q.) *i.e.* by a Grant of Privilege (which they ſaid was only a Perſonal Diſcharge, (Q.) and determines with the Corporation (Q.) and not by any Real Compoſition, unleſs it could be ſhewed, (Q.) See 1 *Cro.* 422. 1 *Jon.* 368. 1 *Roll. Abr.* 654.

Preſcription de non Decimando.

But the Reader may obſerve from the ſeveral *Quæries* in this Caſe, That the Ground and Foundation of this Caſe is very much ſuſpected, and the Court ſtretched their Judgment too far in Favour of *Mother Church*, or elſe they could never have conceived a local Grant of Privileges to be only Perſonal, nor have imagined ſuch a *Grant*, and not a *Real Compoſition*, the later being more rational to be preſumed than a *Grant*, without any Conſideration, (for ſo are all thoſe Grants ſuppoſed to be).

But, as is before obſerv'd, *Croke*, Ch. Juſt. was upon better Reaſons induced to be of a dif-

different Opinion. And in a like Caſe, *Dodderidge* ſaid, That if it be alledged, that the Abbey was founded before Time of Memory, and that from the Foundation, until the Diſſolution, the Land had been diſcharged of Tithes, this had been good. To which *Coke* agreed, 1 *Roll. Rep.* 54. Dr. *Leyfield*'s Caſe. And though *Hobart* admits, That a Diſcharge by Compoſition, Bull, Canon or Order, were but Perſonal, and died with the Body, without the Aid of a Statute to ſupport them, (which implies that the ſaid Act continued the Diſcharge in the Hands of the King, *&c.*) Yet he further held, That a Diſcharge by Preſcription is of another Nature. For, having been always (as a Preſcription preſumes) in Spiritual Hands, the Law will adjudge, That it was never charged with Tithes, or as the pleading is, *Quod ſemper, &c. immunis erat a Solutione Decimarum, i. e. negative non privative*, always uncharged, not diſcharged.

Diſcharge by Grant, &c.

Non-charge by Preſcription.

And the Reaſon hereof was, that being Spiritual Perſons, they were able to miniſter to themſelves Spiritual Rights, and therefore performing *Officium*, they might well retain *Beneficium*, and ſo this Non-charge ſtanding upon Preſcription, was inherent in the Land, not as a Thing given, but as a *Non-ens*, not as a *Diſcharge*, but as a *Non-Charge*. Thus Lands that never yielded Tithes, and Lands of the leſſer Monaſteries, and ſo free of Tithes, the King by the Stat. 27 *H.* 8. and his Patentees were to hold Free, not by Reaſon of any Privilege, which did need to be preſerved by Statute, but even by

Note.

by any Grant of the Land by any Kind of Conveyance. And therefore though a Diſcharge by Bull or Compoſition was to die with the Perſon, yet if it was once run Time out of Mind, *&c.* it was then to be pleaded and uſed as a *Non-charge* by Preſcription, which was a Title of Diſcharge by the Temporal Law; and if it were impugned, it was to be drawn by Prohibition to a Trial at the Common Law, and this without the Help of any Statute. So clear was that great and learned Judge in his Opinion, that Preſcription is a good Diſcharge of Tithes of Lands given by the ſaid Stat. 27 *H.* 8. See *Hob.* 113. 1 *Jon.* 2. and 2 *Cro.* 607. S. C. *Vide poſt.*

How tried.

Watſon *p.* 515.

But here I think myſelf obliged to give the Reader the before-mentioned Author's Senſe of this Act of Parliament, in his own Words, *viz.*

As for the Stat. 27 *H.* 8. The Lands thereby given to the Crown were ſuch Monaſteries, Priories, or other Religious Houſes, as were not above the clear yearly Value of 200 *l.* and theſe are not thereby made Free from the Payment of Tithes, altho' they were by the ſame Statute given in as large and ample Manner as the Abbots, *&c.* had the ſame in Right of their Houſes. Alſo all ſuch Lands, *&c.* were by this Statute given or convey'd to the Crown, which did belong to any Monaſtery, Abby, or Priory, as at any Time (within one Year next) before the making of the Act had been given or granted to the King by the Governors thereof, under their Covent Seal,

Quære of theſe Words.

or that otherwiſe had then been ſuppreſſed or diſſolved. And (ſays he) this Statute, nor any other, not containing any Clauſe or Words of Diſcharge, the Lands thereby given have been, ſince the ſaid Statute, ſubject to the Payment of Tithes, altho' they might be free from that Duty whilſt in the Hands of the Religious Poſſeſſors, or if their Right to them had continued.

And therefore in this Caſe, if a Prior, *&c.* had been diſcharged by Privilege only, (that is by Bull or Canon) by *Brampſton*, *Jones* and *Berkley* againſt *Croke*, the ſaid Statute 27 *H.* 8. doth not preſerve this Privilege, becauſe there are not any Words therein, that the Lands given thereby ſhall be diſcharg'd, as the Abbots, *&c.* held them; and general Words will not preſerve Privileges (to the King) which were determin'd (this is denied, being only *transferr'd*) unleſs ſpecially revived. *A ſtrange Reaſon.*

Alſo theſe Judges (*Mich.* 11 *Car.* 1.) further ſaid, That the Statute 31 *H.* 8. doth not extend to free Lands given by the former Statutes; for all the Scope of the ſaid Statute is only to extend to Abbies which came to the King after the Fourth of *February* 27 *H.* 8. and all Abbies which came to the King by the ſaid Statute 27 *H.* 8. came to him upon, or before the 4th of *February*, 27 *H.* 8. and to thoſe the Statute 31 *H.* 8. doth not * *intend to extend.* For in every Branch are mentioned only the Abbies, *&c.* which came to the King *after* † 27 *H.* 8. and although this Clauſe to be diſcharged of Tithes be in the Body of the ſaid Act, yet it muſt be expounded and coupled with *A nice Conſtruction.* * *A Manifeſt Falſity.* † *By Virtue of.*

the Clauſes before, which mention and intend only what came to the King after the ſaid Fourth of *February* 27 *H.* 8. and doth not extend to ſuch Abbies, *&c.* as came to the King upon the ſaid Fourth of *February*, 27 *H.* 8. and *Jones* ſaid, Although it is no Statute till the End of the Seſſion, when the King's Aſſent is given; yet when there hath been a Seſſion, it ſhall have ſuch Relation to the firſt Day of the Seſſion, that they veſt actually in the King the ſaid Fourth of *February* 27 *H.* 8. (inferring that they were not veſted in him after the ſaid Fourth of *February*) and, That the King ſhall have the Rents incurred after the firſt Day, and before the laſt Day of the Seſſion; and if they be paid in the *Interim* to the Abbot, *&c.* they ſhall be paid again to the King; and both *Jones* and *Brampſton* relied upon a Judgment 18 *Jac.* 1. in the Common Pleas, between *Gerrard* and *Wright*, wherein it is ſaid to be held upon ſolemn Argument by *Hobart*, *Winch* and *Hutton*, Juſtices, That the Statute 31 *H.* 8. doth not extend to Abbies which came to the King by the Statute 27 *H.* 8. And that in this Court, in the Caſe of *Whitton* and *Weſton*, for the Poſſeſſions of the Abby of St. *John* of *Jeruſalem*, 4*to Car.* 1. where the Queſtion being, Whether the ſaid Abby came to the King by the ſpecial Act of 32 *H.* 8. all the four Judges agreed the Caſe of *Gerrard* and *Wright* was good Law, That the Abbies which came to the King by the 27 *H.* 8. were not within the Privilege of 31 *H.* 8. nor to have the Benefit of the ſaid Statute of 31 *H.* 8. And *Berkley Juſtice* inſiſted much

This is true, but not ad Rem.

much, That this Privilege to be discharged of Tithes, being a mere Spiritual Privilege, was determined by the Dissolution of the Abbies, and tied only to their Bodies and Persons, and that it cannot be revived without especial Words, which are not in either of the Statutes of 27 *H.* 8. or 31 *H.* 8. and that altho' the Stat. of 31 *H.* 8. doth extend to the said Abbies, suppressed by the Stat. 27 *H.* 8. yet there is a Saving in the said Statute of 31 *H.* 8. of all Rights and Interests, except to the Donors, the Abbots, *&c.* So that the Persons which have Right to Tithes are preserved by this Saving. But this Point was denied by all the other Judges in their Arguments, who held, that the Saving any Right, *&c.* doth not extend to any Persons to save their Right against such Privileges, being against the Words, and the Intent of the said Statute; wherefore for the Reasons *supra*, but principally for that the Abby dissolved appeared to be suppressed by said Statute of 27 *H.* 8. by the Opinion of the said three Justices, *contra Croke*, it was adjudged for the Defendant, and a Consultation awarded in the said Case of *Sydown* and *Holm.* 1 *Jones* 368. and 1 *Cro.* 422. *Noy* 97. See also 1 *Jones* 2 & 6. 2 *Cro.* 607. and *Hob.* 306, 113, 295, *&c.*

Why then were the Words, In as large and ample Manner, *&c. inserted in the Stat.* ante p. 250.

To shew at large the Errors of that Judgment, in the Case of *Sydown* and *Holm*, would require a just Volume; I shall therefore only content my self at present, with observing (besides what is noted in the Margin *supra*) That the Opinions of the three Judges in Support of it, seem to be grounded chiefly on the Notion of Tithes being

due *Jure Divino*, to Eccleſiaſtical Perſons, and to ſuch as were privileg'd by the Pope's Bull, *&c.* and therefore the Lands they held might well be Diſcharg'd of Tithes, as Sacred, whilſt they continu'd in thoſe ſacred Hands; which could not be held ſo diſcharged, even by the King himſelf, or his Patentee, notwithſtanding the ſaid Act 27 *H.* 8. had tranſferr'd not only the ſaid Lands, but alſo all the *Tithes*, *Penſions*, *Portions*, *Rights*, *Conditions* and *Intereſts*, in *as large and ample Manner as the Abbots*, *Priors*, &c. *held the ſame*, &c. And the Conſequence of that Judgment muſt be, That tho' the Act veſts the Lands ſo diſcharged, *&c.* in the King; yet the King could not hold them ſo diſcharged, *&c.* a Propoſition ſo highly irrational, as nothing can ſupport it, by that Opinion of *Berkley*, That it was a meer *Spiritual Privilege*, and determined by the Diſſolution of the Abbies, and that it was tied only to their Bodies and Perſons, *&c.* And tho' the other Judges could not come up to the Abſurdity of theſe Premiſſes; yet two of them, *viz. Brampſton* and *Jones*, (influenc'd, as ſuppos'd) concurr'd with him in as abſurd a Concluſion; whereas *Croke* ſeems more impartial and unbiaſs'd in his Judgment, and conſequently his Opinion muſt have greater Weight with all unprejudiced and diſintereſted Minds.

Note this was 11 Car. 1.

And yet the Miſchief of that Caſe ſeems to have been derived down to our own Times; ſo great is the Force of Precedent and Example in Courts of Law, *&c.* as may be ſeen in the Caſe of *Bolls* verſ. *Atkinſon*,

ſon, Trin. 18 *Car.* 2. *B. R.* where, tho' an Abbot, Time out of Mind, had held Lands diſcharged of Tithes, yet 'twas adjudg'd the Alienee, or Patentee, ſhould be charged with Tithes. See the Caſe 1 *Lev.* 185. 1 *Sid.* 320. 1 *Keb.* 162. 2 *Keb.* 28, 60, 85, 162, 175. Q. 2 *Show.* 184, 439, 460. Vide ante Hob 248. Hetley 133.

The next Statute whereby Monaſteries, *&c.* were diſſolved, and their Lands given to the Crown, is that of 31 *H.* 8. *c.* 13. Wherein there is a Clauſe for freeing thoſe Lands, and others given by the former Statute, from the Payment of Tithes, *&c. viz.* Stat. 31 H. 8. c. 13. *Sect.* 31.

'And whereas divers and ſundry Abbots, 'Priors, Abbeſſes, Prioreſſes and other Ec-'cleſiaſtical Governours and Governeſſes of 'the ſaid Monaſteries, Abbathies, Priories, 'Nunneries, Colleges, Hoſpitals, Houſes of 'Friars, and other Religious and Eccleſiaſ-'tical Houſes and Places have *had, poſſeſſed* 'and enjoyed divers and ſundry *Parſonages,* 'appropriated *Tithes, Penſions and Portions*; 'and were *alſo acquitted and diſcharged of* 'and for (from) *the Payment or Payments of* 'Tithes to be paid out, and for their ſaid 'Monaſteries, Abbathies, Priories, Nunne-'ries, Colleges, Hoſpitals, Houſes of Fri-'ars, and other Religious and Eccleſiaſtical 'Houſes and Places, Manors, Meſſuages, 'Lands, Tenements and Hereditaments. 'Be it therefore enacted, by the Authority 'aforeſaid, That *as well the King* our Sove-'reign Lord, his Heirs and Succeſſors, and 'all and every *ſuch* (other) *Perſon and Per-'ſons, their Heirs and Aſſigns,* which have or 'hereafter ſhall have, any Monaſteries, Ab-

‘ bathies, Priories, Nunneries, Colleges,
‘ Hoſpitals, Houſes of Friars, or other Ec-
‘ cleſiaſtical Houſes or Places, Scites, Cir-
‘ cuits or Precincts, of the ſame or any of
‘ them, or any Manors, Meſſuages, Par-
‘ ſonages appropriate, *Tithes*, *Penſions*, *Por-*
‘ *tions*, or other *Hereditaments*, whatſoever
‘ they be, which belonged or appertained,
‘ or which now belong or appertain unto
‘ the ſaid Monaſteries, Abbathies, Priories,
‘ Nunneries, Colleges, Hoſpitals, Houſes
‘ of Friars, or other Religious and Eccle-
‘ ſiaſtical Houſes or Places, or unto any of
‘ them, ſhall have, hold, retain, keep and
‘ enjoy, as well the ſaid Parſonages ap-
‘ propriate, Tithes, Penſions and Portions,
‘ as the ſaid Monaſteries, Abbathies, Nun-
‘ neries, Colleges, Hoſpitals, Houſes of
‘ Friars, and other Religious and Eccleſi-
‘ aſtical Houſes and Places, Scites, Circuits,
‘ Precincts, Manors, Meaſes, Lands, Te-
‘ nements and other *Hereditaments*, whatſo-
‘ ever they be, and every of them, accor-
‘ ding to their (*i. e.* the Abbots, Priors, &c.)
‘ Eſtates and Titles, *diſcharged and acquitted*
‘ *of Payment of Tithes*, *as freely and in as*
‘ *large and ample Manner*, as the ſaid late
‘ Abbots, Priors, Abbeſſes, Prioreſſes, and
‘ other Eccleſiaſtical Governours and Go-
‘ verneſſes, or any of them, had held, oc-
‘ cupied, poſſeſſed, uſed, retained, or en-
‘ joyed the ſame, or any Parcel thereof, at
‘ the Days of their Diſſolution, Suppreſ-
‘ ſion, renouncing, relinquiſhing, forfeit-
‘ ing, giving up, or coming to the King's
‘ Highnéſs, of ſuch Monaſteries, Abbathies,
‘ Priories,

'Priories, Nunneries, Colleges, Hoſpitals 'Houſes of Friars; or other Religious or 'Eccleſiaſtical Houſes or Places, or at the 'Day of the Diſſolution, Suppreſſion, Re-'nouncing, Relinquiſhing, Forfeiting, gi-'ving up, or coming to the King's High-'neſs of any of them, this Act or any 'Thing therein contained to the contrary 'notwithſtanding'.

The Act retroſpects a Survey taken 26 H. 8.

Note; this Act had a Retroſpect to a general Survey taken 26 *H.* 8. whereby ſuch Monaſteries in *England* and *Wales*, as were of the yearly Value of 200 *l.* and upwards, were taken and returned, and were in Purſuance thereof diſſolved by the ſaid Statute 31 *H.* 8. and by the Words thereof were intended to be *diſcharged and acquitted from the Payment of Tithes, as freely*, and in the large and ample Manner, *&c. ut ſupra*, tho' another Conſtruction has been given thereto. *Vide infra.*

See a Liſt of the Monaſteries, Abbies, *&c.* of above 200 *l.* yearly Value, which were diſſolved by the ſaid Act 31 *H.* 8. with their reſpective Names, Values, and when Founded, in *Degg's Parſons Counſellor, prope Finem*; and in *Watſon's Compleat Incumbent, p.* 519 *to* 526. *& hic in Finem.*

By the former of theſe Acts, *viz.* 27 *H.* 8. all Monaſteries, Priories, *&c.* under 200 *l. per Annum*, were veſted in the King, his Heirs and Aſſigns for ever, in as large and ample Manner as the Abbots, *&c.* held the ſame; and by the later Stat. it is enacted, That where Abbots, Priors, *&c.* held any Parſonages, appropriated Tithes, Penſions,

or Portions, or were acquitted, or diſcharged from the Payment of Tithes, for any their Houſes, Places, Scites, Manors, Meſſuages, Lands, Tenements, or Hereditaments, *&c.* not only the King, his Heirs and Succeſſors, but every other Perſon, his Heirs and Aſſigns poſſeſſed, or to be poſſeſs'd of ſuch Houſes, Manors, Lands, *&c.* ſhould hold the ſame, and all Titles and Eſtates therein, diſcharged and acquitted of the Payment of Tithes, as freely as the Abbots, *&c.* themſelves.

Not all Monaſteries under Value diſſolved by 27 H. 8. *but ſome by* 31 H. 8.

And here we may alſo obſerve, That not all the Monaſteries, Priories, and other Religious Houſes, not above 200 *l.* yearly Value, were diſſolved by the Statute 27 *H.* 8. tho' they might have been ſo, but ſome of them were diſſolved by this later Statute 31 *H.* 8. and the Reaſon is, becauſe there is a *Proviſo* in the former Statute (which indeed is left out in the printed Statutes at large) That notwithſtanding that Act, the King might by his Letters Patents, under the Great Seal of *England*, continue any of the ſaid Monaſteries, and therefore ſuch of them as were ſo continued by the King's Letters Patents, are not to be look'd on as diſſolved by 27 *H.* 8. tho' they are by 31 *H.* 8. and ſo the Lands belonging to them, that were held Tithe-free before the Diſſolution, remain ſo by Force of the before cited Clauſe in 31 *H.* 8. as was adjudg'd in the Exchequer Chamber between *Walklute*, Farmer of the Rectory of *Utoxeter* in *Staffordſhire*, and *Wilſham*, the Owner of a Farm there, formerly belonging to the Abby of *Croxden*, a

ſmall Abby of the *Ciſtertians*, which *Wilſham* ſhewed was continued by Letters Patents, and not diſſolved by 31 *H.* 8. See *Degg*, *Part* 2. *cap.* 11.

Where Lands of leſſer Monaſteries were given to the Greater; ſee Watſon, 526. *&c.*

But it is ſaid we are not from hence to infer, That ſuch Lands as did belong to the leſſer Monaſteries ſo diſſolved by 27 *H.* 8. and thereby then held Tithe-free, being after the Diſſolution thereof given to ſome other greater Monaſteries, that were not diſſolved but by the Statute 31 *H.* 8. ſhall be now held free from paying Tithes by Force of the ſaid Clauſe in 31 *H.* 8. *ſupra*. And the Reaſon rendred (tho' ſomewhat weak) is this: For that upon the Diſſolution of the Corporations to which they belonged, they immediately became Tithable, even in the King's Hands, as is pretended; and ſo could not be held by the greater Abbies more free than the King their Donor had them; and conſequently (ſay they) tho' they came the ſecond Time to the King by 31 *H.* 8. yet they came to him as the Abby held them, *viz.* ſubject to Tithes; and ſo the Clauſe of Diſcharge *ſupra*, does not extend to them. See and Note *Hob.* 307. 1 *Jon. p.* 2. and 2 *Cro.* 607. S. C. But after Peruſal of *Hobart*'s Argument, and the Acts and Clauſe *ſupra*, I ſhall leave the Force of this Reaſoning to the Reader's Conſideration.

What Lands of the greater Monaſteries are diſcharg'd.

It is further urged by the ſame Arguers, and with more Truth, That all the other Lands that did belong to the greater Monaſteries, diſſolved by 31 *H.* 8. or of thoſe leſſer Monaſteries, continued by the King's Letters Patents, and alſo diſſolved by the

the ſame Statute, are not diſcharged from the Payment of Tithes, but only ſuch of them as were held diſcharged by the Religious Perſons themſelves, who enjoy'd them ſo diſcharged before the Diſſolution.

But of thoſe held ſo diſcharged, 'tis ſaid, ſome where held abſolutely diſcharged, others diſcharged only whilſt they remained in the actual Occupation and Manurance of the Owners thereof: But *Quære* of this later Kind; for if ſo, the King himſelf, 'tis ſaid, could not hold them diſcharged.

Abſolutely diſcharged. The Arguer further ſays, That ſuch Lands as were held abſolutely diſcharged, were ſuch as were diſcharged originally, either by Compoſition Real, or by *Bulls or Grants of the Pope*, (not a Word of the King or Parliament) and for this or that Parcel of Land, or this or that Sort of Tithe only; ſo Reſtrictive are the Clergy in Caſes of Diſcharge.

Preſcription I grant Preſcription may well reſtrain the Non-Charge to this or that particular Land, or Species of Tithe. (But what has that to do with the Pope's Bulls or Grants, *&c.*) A Preſcription, in its Nature and Quality, is quite different from a Bull or Grant; A Preſcription is a Law, and always ſuppoſes an original and antecedent Right, not to be liable to this or that Charge; a Bull or Grant is properly a *non obſtante*, or Diſpenſation from a Law, as in this Caſe of Tithes: A Preſcription from Payment implies a Law or Right not to pay; but a Grant not to pay is a Diſpenſation from that Law or Right; and accordingly the following Caſe is put not upon the Pope's Bull

and Grant, their Difference, vide ante.

or

or Grant, as Mr. *Watſon* ſuppoſes, but upon an original and preſcriptive Right, *viz.*

A Parſon ſued for the Tithe of Hay and Grain within the *Demeans* of a Manor within a Pariſh, of which the Dean and Chapter of *P.* after the Diſſolution of Monaſteries were Owners, in Regard, That *within the Time whereof the Memory of Man was not to the contrary, both before the Diſſolution and at the Time of the Diſſolution of the Abby*, to which the Manor, *&c.* formerly did belong, *no ſuch Tithes of Hay and Grain*, (but only other Tithes, as Wool, Lamb, *&c.*) *were paid by the Farmers, or Occupiers by Leaſe or at Will, being Lay Perſons.* And it was ſaid by the Judges and Clerks of the Court, That Prohibitions in this Caſe, upon the Statute 31 *H.* 8. by Virtue of the Word *Diſcharged* therein, importing a Non-charge, were very ordinary. See *Dyer* 349.

Preſcription in Non Decimando *by Laymen.*

And hence it appears, That ſuch Lands as are Free by Preſcription in either Reſpect, *i. e.* ſo that no Tithes ſhall be paid of ſuch Lands, or that none ſhall be paid of this or that ſort of the Produce thereof, are abſolutely freed from the Payment thereof, ſo as the ſame Freedom extends not only to the Owners, but alſo to their Tenants, Farmers and Occupiers under them.

Abſolutely freed in both Reſpects.

And yet 'tis ſaid, not all that receive any Profit from the Lands belonging to a Manor freed as aforeſaid, ſhall be underſtood to be Tenants, Farmers, or Occupiers; for if one or more Perſons have *Libertatem Falcandi*, to make Hay only, or alſo to put their Cattle on the Lands that belong to ſuch a Manor

Manor as Appendant to their Houſes, &c. they are but Commoners, and not Farmers or Occupiers, becauſe what is taken is taken as a Profit Apprender; and therefore, if a Preſcription be, That the Abbot, his Farmers, Tenants and Occupiers of the Lands, ſhould be diſcharged of the Tithes of the Lands, where the Commoners had ſuch Privileges, it ſhall not be extended to them, as is held in 2 *Bulſt.* 248. and 1 *Roll. R.* 53. S. C. *Sed Quære* if Law: For, I take it, if the Land be diſcharged, the Profit *Apprendre* muſt be ſo too.

Some Opinions cenſured. Nor can I entirely agree with Mr. *Watſon* (and ſome other Opinions,) in what he further Urges, *viz.* That theſe Titles of Diſcharge, being for the moſt part loſt, run out into Preſcriptions; and that from thence all other Preſcriptions, *De non Decimando*, are ſuppoſed to have their Beginning, and that therefore it is needleſs, when a Diſcharge is to be ſhewed, to ſet forth the Original thereof, otherwiſe than by Preſcription, or that they were held by ſuch Monaſteries diſſolved by 31 *H.* 8. Time whereof, &c. free from the Payment of Tithes: For ſays he, it ſhall be preſumed, That it was by lawful Means. (I ſuppoſe he means the Pope's Bull or Grant, for he before reſtrains the King and Parliament.) See 1 *Leon.* 241. Beſides, he here makes ſuch Grants the Parents of Preſcription, and antecedent to it; whereas the contrary might be eaſily proved, *viz.* That Preſcription is an original Right, and is always ſuppos'd to be antecedent to a Grant. Nor can a Grant ſupport a preſcriptive

ſcriptive Right. And here the Queſtion might be asked, what Grant can be ſuppoſed of thoſe preſcriptive Rights of being Tithe-free in the Wolds or Wilds of *Kent* and *Suſſex*, *&c.* and yet I admit ſome Great Authorities favour the other Opinion.

Manner of Diſcharge of Abby Lands.

And accordingly it has been held, That in a Declaration upon a Prohibition, the Plaintiff ought to ſhew not only, That the Abbot held the Lands diſcharged at the Time of the Diſſolution, but alſo how (or by what means, and in what manner) he held the ſame ſo diſcharged: For that the Statute 31 *H.* 8. ſaith, *in as large and ample Manner as the Abbot held*, *&c.* So that the Statute pinches upon the Manner it was held by: Beſides, ſay they, ſuch a Claim of Diſcharge of Tithes is contrary to Common Right; and therefore ſhall be taken ſtrictly, by *Hobart*, *Hutton* and *Winch*, *contra Warburton*; and yet they all agreed, That to ſay, the Lands were held Tithe-free, Time out of Mind, may be a ſufficient Diſcharge; and ſo doubtleſs it will, if that Point be put in Iſſue, and a Verdict found thereon. See *Noy* 97. 1 *Jon.* 6. *Hob.* 295. *Sed Quære*, if *Hobart*'s Opinion *ſupra* be not miſreported; for elſe he ſeems repugnant to himſelf, and the Opinion he delivers in *pag.* 113. of his own *Reports*. *Vide ante.*

Preſcriptions in non Decimando.

Note alſo the Vicar of *Cheſham*'s Caſe in *Hetley*'s *Reports*, *viz.* The Earl of *D.* had a Manor in the Pariſh of *C.* which extended into *L.* where there is a Chapel of Eaſe; and the Vicar of *C.* libell'd for Tithes in the Eccleſiaſtical Court againſt one of the Tenants of

of the Manor; and *Hendon* mov'd for a Prohibition, for that the Earl preſcribed, That he, and all his Tenants, ſhould be acquitted of all the Tithes of Land within *L.* paying 10 *s. per Annum*, to the Chaplain of *L.* and he ſaid, That ſuch a Preſcription was good, as was adjudged in *Bowle's* Caſe; and a Prohibition was granted accordingly.

And 'tis to be obſerved, That no Parſon, Vicar, or Incumbent of a Church, could claim Tithes *de Jure* before the 2d Council of *Lateran*, *i. e. ſub Anno* 1270. For before that Council no Pariſhes were eſtabliſhed here in *England*. See 4 *Mod.* 337.

And tho' 'tis ſaid, a Layman can't preſcribe *in non Decimando*, yet 'tis allowed, That there may be a Cuſtom to exempt him from the Payment of Tithes. *Ibid.* 341.

And a Preſcription to be diſcharged of Tithes may be good for a whole Hundred, or a Country, or a Diſtrict, may be good tho' it cannot be good for a particular Vill or Hamlet. *Ibid.* 342.

Yet 'tis ſaid a Cuſtom alledged *in non Decimando*, tho' in a whole Hundred, *&c.* is not good, except it be ſhewn, that there was a ſufficient Maintenance for the Parſon beſides. *Ibid.* 336, 340.

Alſo a Country, or Hundred, can't preſcribe *in non Decimando*, for Things that are Tithable of Common Right; but for Things that are not Tithable of Common Right, they may ſo preſcribe. *Hicks* verſ. *Woodiſon.* 1 *Salk.* 655. See 4 *Mod.* 336. *Cumberb.* 403. *Skinner* 560.

Alſo

Alſo a Diſcharge, either by Compoſition, Bull, or Grant, muſt appear only by Preſcription, and if it ſo appear, as to Lands given by 31 *H.* 8. or otherwiſe, it ſhall be allowed at this Day. 1 *Jon.* 368.

Alſo, if an Abbot, or Prior, were ſeized of Lands diſcharged of Tithes, he that is ſeized of ſuch Lands may well preſcribe *in non Decimando* by the Statute 1 or 2 *Ed.* 6. which wills, That none pay Tithes otherwiſe than they were paid in forty Years before. See *Moor* 219. *Branche*'s Caſe.

But in that Caſe and others, 'tis ſaid, That a Man ſhall in no other Caſe preſcribe *in non Decimando*, but only *in modo Decimandi*. *Quære.*

'Tis alſo noted, That no Abbot or Prior, *&c.* could make any ſuch Preſcription *in non Decimando*, but where the Abby or Monaſtery was founded before the Time of Memory, *i. e.* before the Firſt Year of *R.* 1. *Anno* 1120. that being the Time of Limitation of all Preſcriptions at Common Law. See 11 *Co.* 14. 2 *Roll. Abr.* 269. 2 *Keb.* 459. 3 *Keb.* 45. & 217. *Raym.* 225. *Vide ante*, *fol.* 47. *b.* Watſon 528.

Alſo by Statute 2 *H.* 4. *c.* 4. it has been Enacted, 'That no Perſon Religious nor 'Secular, of what Eſtate or Condition that 'he be, by Colour of any Bulls, containing 'ſuch Privileges to be diſcharged of *Diſmes*, 'pertaining to Pariſh Churches, Prebends, 'Hoſpitals, or Vicarages, purchaſed before 'the Firſt Year of King *Richard* the Second, after the Conqueſt or ſithence, not 'executed, ſhall put in Execution any 'ſuch *Stat.* 2 H. 4. c. 4. *Bulls ſince* 1 *R.* 2. *not to be executed, &c.*

'such Bulls ſo purchaſed, or any ſuch Bulls 'to be purchaſed in Time to come; and 'if any ſuch Religious or Secular Perſon, 'of what Eſtate or Condition he be, from 'henceforth by colour of ſuch Bulls, do 'trouble any Perſon of Holy Church, 'Prebendaries, Wardens of Hoſpitals, or 'Vicars, ſo that they cannot take or en-'joy the Diſmes, due or pertaining to 'them of their ſaid Benefices, that then 'ſuch Diſturbers ſhall incur like Proceſs 'and * Pain, as is ordained by the Statute 'made againſt them of the Order of *Ci-'ſteaux*, in the Second Year of our ſaid 'Lord the King, that now is. *See the ſaid Statute ante.*

* i. e. Premunire.

By this laſt Statute it appears, That as the Lands of Churches, *&c.* founded ſince the 1ſt Year of King *R.* 1. (2.) as aforeſaid, cannot plead Preſcription for an abſolute Diſcharge of Tithes; ſo no Pope's Bull purchaſed ſince that Time can be pleaded as a Ground for an *abſolute* Diſcharge thereof, *i. e.* not only for the Owners whilſt occupied by themſelves, but alſo for their Farmers, Tenants, or Occupiers, whether the Eſtate was belonging to any Religious Perſons, or did, or at this Day doth belong to any of the Secular Clergy; and yet I ſuppoſe a Real Compoſition, if it can be ſhewed, may be a ſufficient Diſcharge, if it was made ſince this Statute, or ſince the Time of Limitation of Preſcriptions; provided it was alſo made before 1 *Eliz.* where the Tithes did belong to a Biſhop, or before 13 *Eliz.* where they did belong to any College, Dean, Dean and

and Chapter, Archdeacon, Prebend, Parſon, Vicar, *&c.* as before is ſhewn.

Where a Monaſtery was ſeized both of Lands and the Rectory ſimul &c.

But though a Preſcription *de non Decimando*, without the Aid of an Act of Parliament, is ſaid *ſupra* to periſh when a Spiritual Corporation is diſſolved, and the Lands come to a Lay Hand; yet by Reaſon of the direct and pregnant Clauſe in the ſaid Stat. 31 *H.* 8. a Preſcription *in non Decimando* is allow'd to be of that Force, That where any of the Lands belonging to the Monaſteries diſſolved by the 31 *H.* 8. were within the Pariſhes whoſe Churches were appropriated to any of the ſaid Monaſteries, ſo that the ſaid Monaſtery was ſeized both of the ſaid Lands and Rectory *ſimul & ſemel*, Time out of Mind, and paid no Tithes within the Memory of Man for the Lands, ſuch Lands ſhall be diſcharged from the Payment of Tithes by ſuch perpetual Unity of Poſſeſſion, as was adjudged *Mich.* 34 & 35 *Eliz.* and *Trin.* 38 *Eliz. &c.* See 2 *Co.* 47, 48. the Archbiſhop of *Canterbury*'s Caſe, and 4 *Leon.* 47. *Prowſe*'s Caſe; and *Moor* 528. *Benton*'s Caſe. But touching Diſcharges by *Unity of Poſſeſſion*, &c. ſee the precedent Chapter.

Three Orders diſcharged by Stat. 31 H. 8. *from paying Tithes for Lands in their own Hands.*

Now the Lands, which before the Diſſolution, and to the Time thereof, were generally held to be diſcharged from the Payment of Tithes, whilſt in the actual Occupation and Manurance of the Owners, were ſuch Lands as were held by thoſe of the Orders of the *Ciſtertians* and *Hoſpitalers*, and the *Præmonſtrants*; for though in the Time of *H.* 2. and about the Year 1150.

Pope *Adrian* the fourth reſtrained this Privilege to the *Ciſterians*, *Templars* and *Hoſpitalers*, and afterwards Pope *Clement* the Third did, by his Bull, give the ſame Privilege to the *Præmonſtratenſes*. (See *Selden of Tithes*, 120. *Bendl.* 164, &c.) So that four Orders were then ſo privileged, yet the *Templars* being afterwards condemned for Hereſy, and diſſolved in the 4th Year of *Ed.* 2. there then remained but three of the ſaid Orders, ſo freed from paying of Tithes for the Lands in their own Hands, when the ſaid Stat. 31 *H.* 8. was made.

And yet not all the Lands they had at that Time were ſo privileged, for no Lands obtained by any of theſe Orders after the Council of *Lateran*, which was in the Year of our Lord 1215. were freed from the Payment of Tithes, not even whilſt manured by themſelves, and by Conſequence, no Lands belonging to the Abbies, *&c.* of thoſe Orders that were founded after that Council, are diſcharged from the Payment of Tithes, either in the Owner or the Tenants Hands; for by that Council the Privilege was limited to ſuch Lands as theſe Orders had at the Time of the Council. See *Selden of Tithes* 121.

Alſo it has been held *per Cur.* (*quære* if good Law) That the Council of *Lateran*, which ſo freed theſe Orders from the Payment of Tithes, was a general Law received in *England*, and that if Lands were diſcharged of Tithes by that Council, no after Covenant or Contract made by any Abbot to pay Tithes, could diſpenſe with this Privilege, or make

the ſame liable to the Payment of Tithes; for being once diſcharged by that Council, they became always diſcharged, that Council being ſaid to be as forcible as an Act of Parliament, which concludes all Parties. And the Court further held, That if there were an Agreement for Payment of Tithes, before the ſaid Council; yet the Council as a general Law, which includes all Mens Conſent, had diſcharged ſuch Agreement. See *Hardr. Rep.* 101. *Stavely* verſus *Ullithorn.*

St. John's of Jeruſalem *by* 32 H. 8. c. 24.

Nor were all the Houſes of thoſe Orders, not ſurrendred or diſſolved by the Statute 27 *H.* 8. diſſolved or ſurrendred by Force of the Stat. 31 *H.* 8. For thoſe of the Hoſpital of St. *John of Jeruſalem* were diſſolved by the Stat. 32 *H.* 8. *c.* 24. and not before. See 2 *Brownl.* 8. and ſo their Lands were not privileged from paying Tithes by Force of the ſaid Statute of 31 *H.* 8. *Vide infra.*

How far 31 H. 8. *diſcharged of Tithes.*

By the Stat. 31 *H.* 8. the Lands of ſuch Houſes, *&c.* as were thereby diſſolved, ſhall be free from the Payment of Tithes, ſo far only as they were free in the Hands of the Churchmen, *viz.* whilſt they are in the Hands and Manurance of the Owners thereof; and therefore it is neceſſary for the Party, who would have the Advantage of this Privilege, expreſly to ſhew and aver, That the Lands are in his Hands and Manurance; for to ſay that he is ſeized of the Land is not ſufficient; for he may be ſeized thereof, and yet another manure them. See *Bendlo.* 164, 168, 169.

Lay Owners ſince the Diſſolution.

Alſo, If the Lands of ſuch Orders ſo privileged, were in Leaſe for Years at the Time

of their Diſſolution, and for certain Years before, yet the Lay Owners ſince the Diſſolution, ſhall hold them diſcharged whilſt manured by themſelves; for although the Abbot's Farmer paid Tithes at the Time of the Diſſolution, yet as to the Abbot himſelf, the Inheritance was then diſcharged of Tithes; and therefore the King, and his Patentee, ſhall have and hold the ſame ſo diſcharged of Tithes, as the Abbot held it. See 2 *Cro.* 559. *Porter* verſ. *Bathurſt*, and *Hardr.* 190. *Wilſon* verſ. *Redmayne*, &c.

Where the Donee and his Heirs, not diſcharged.

Yet when an Abbot, having ſuch Privilege, had in the Time of *Ed.* 4. made a Gift in Tail, though the Abby was diſſolved by the 31 *H.* 8. yet it was reſolved, That notwithſtanding the Clauſe of Diſcharge in the ſaid Statute, the Donee ſhould not be diſcharged of Tithes; for the Statute diſchargeth none, but as the Abbot was diſcharged at the Time of the Diſſolution; ſo that they muſt claim both the Eſtate and the Diſcharge under the Abbot; but if by a common Recovery, the Reverſion had been barred before or after the Statute; or if that the Land had returned to the Abbot, or the King, before or after the Statute, the Caſe had been otherwiſe. See *Hobart* 248. and *Hetley* 133. S. C. *Farmer* verſ. *Sherman*.

Where the King's Farmers, or Tenants are diſcharged.

Alſo whilſt the King's Title to ſuch Lands doth remain, ſo that they be manured by his Farmers or Tenants for Years, or at Will, no Tithes ſhall be paid of them, although Tithes of them ſhould have been paid by the Farmers or Tenants of the Abbots

Abbots or Priors that had them, at the Time of Diſſolution; and the Reaſon given is, becauſe the King himſelf cannot manure them.

But if the King, having ſo leaſed them, *&c.* grants over the Reverſion, or doth ſell them, there the *Farmer* ſhall pay Tithes; by *Manwood.* 2 *Leon.* 71. and *Ownen* 56. S. C. Counteſs of *Lennock*'s Caſe. But *Tanfield* ſaid, That the King's Tenants, for Life or Years, ſhould not be free in the former Caſe, but only his Tenants at Will. See *Moor* 915. and it was agreed *per Cur.* That the King's Patentee is to be intended of the King's Farmers, and not his Patentees in Fee. For in the Caſe of the Foreſt of *Savernacle* it was agreed, That the King's Patentee ſhould pay Tithes. See 2 *Keb.* 29. and 1 *Lev.* 185. *Bowles* verſ. *Atkins.*

And ſo it was ſaid in the Caſe of one *Compoſt*, *Mich.* 14 *Car.* 2. *Hardr.* 315. That if the King alien any of the Lands, whereof he is ſo diſcharged of Tithes, his Patentee ſhall pay Tithes; and not only ſo, but the Preſcription of Diſcharge is deſtroyed for ever, tho' the ſame Lands ſhould come to the King's Hands again, by Eſcheat or otherwiſe. (*Quære.*)

However that Caſe was, I take the Law clearly to be, That both the King's Patentee, and the Reverſioner, and their Aſſigns, ſhall have the ſame Privilege that the Abbot himſelf had, *viz.* To hold them free whilſt in his own Hands, and manured by himſelf, and not let to, or manured by another. See *Bendlo.* 143.

Stat. 32 H. 8. cap. 24. *of the Hoſpitals of St.* John of Jeruſalem.

The next Stat. after 31 *H.* 8. for the Diſſolution of Religious Houſes, *&c.* was 32 *H.* 8. *c.* 24. which was made on Purpoſe to diſſolve the Hoſpitals of St. *John of Jeruſalem*, in *England* and *Ireland*, either for that (as ſome think) thoſe of this Order had Power to purchaſe, but not to ſurrender; or becauſe they were beyond Sea, at this Time, and would not, nor could not be compelled to ſurrender as other Religious Houſes did, whoſe Poſſeſſions therefore are at this Day held Tithe-free, as the Spiritual Men held them, by Virtue of the Stat. 31 *H.* 8. although ſurrendred after the ſaid Statute was made.

Their Lands not ſurrendered.

And ſo likewiſe would the Lands of the Hoſpitals of St. *John of Jeruſalem*, without Doubt, and alſo the *Templars* Lands, given to them by Stat. 17 *Ed.* 2. had they been ſurrendred as the others were, and not diſſolved by this Special Act of Parliament of 32 *H.* 8. upon which Occaſion great Doubt and Diſpute hath been, whether they ſhall be held Tithe-free, by the King and his Patentee, as the (Religious) Corporations held them, *viz.* whilſt they are manured by the Owners thereof.

As to which Doubt, two Queſtions have been made.

Firſt, Whether by the Stat. 31 *H.* 8. thoſe Lands were diſcharged of Tithes; and

Secondly, If not, Whether they were ſo diſcharged by this Statute of 32 *H.* 8.?

And as to the firſt Point the Caſe was, That whereas the Prior of St. *John's of Jeruſalem* had made a Leaſe for Years of

of a Manor, two or three Years before the Diſſolution, and the Leſſee did pay Tithes to the Church of *Rocheſter* Proprietary; and after the Diſſolution, the King granted the Reverſion thereof, in as ample Manner as the Prior had the ſame: It was held in Chancery by the Lord Chancellor and *Saunders*, *Southcote* and *Dyer*, Juſtices, upon Conſideration of the ſaid Stat. 31 *H.* 8. *c.* 13. That after the Lands come to the Hands of the Reverſioner, they ſhall be diſcharged from the Payment of Tithes, until they be let out to others to farm. See *Dyer* 277.

Diſcharged in the Reverſioners Hands, until, &c.

After this the Caſe was upon a Suit for the Tithes of Lands formerly belonging to the *Templars*, and which came to the Crown by the Diſſolution of the ſaid Hoſpital of St. *John of Jeruſalem*, as all the other Lands, formerly the *Templars*, did, amongſt other Lands of the *Hoſpitalers*. And it was held, That the Patentee of ſuch ſhould not have the Privilege to be diſcharged from paying Tithes in Reſpect thereof, for by the Common Law, a Lay Perſon was not capable of this Privilege. *Quære* then how either the *Templars* or the *Hoſpitalers* could be diſcharged; for both of theſe Orders were compoſed of Laymen.

Patentees of Templars *Lands not diſcharged.*

And note; in that Caſe it was further ſaid, That if ſuch Lands had come to the King, by the Relinquiſhment or Diſſolution of any Monaſtery, the King himſelf ſhould not have had the Benefit of that Privilege, until the Stat. 31 *H.* 8. and by that Statute it is appointed, *That all Monaſteries, Abbies,*

&c. *which before had come, or afterwards ſhould come to the King, by Suppreſſion, Surrender,* &c. *the King ſhould have in ſuch Manner and Form,* &c. and *that he ſhould have them diſcharged from the Payment of Tithes, as the Abbots,* &c. So as the Makers of that Law intended, That by the firſt Clauſe, without the laſt, the King ſhould not hold them diſcharged, and therefore they added the later Clauſe. *Sed Quære de hoc.*

A ſtrained Conſtruction.

But this Statute of 32 *H.* 8. extends only to ſuch Poſſeſſions as came to the King by Surrender, *&c.* and ſhould be veſted in him, by Force of the ſaid Act, and doth not extend to Poſſeſſions, which veſted in him by another Act of Parliament; according to the Rule taken in the Archbiſhop of *Canterbury*'s Caſe. 2 *Co.* 46. And theſe Lands here, in the Caſe *ſupra*, were given to the King by a Special Act of Parliament, *viz.* 32 *H.* 8. which hath the ſame Words in the firſt Clauſe, as the foregoing Act of 31 *H.* 8. but hath not the Words of the ſecond Clauſe, and therefore (ſay they) there is no Cauſe of holding thoſe Lands diſcharged from Tithes; and it was adjudged accordingly.

And in the ſame Term, another like Judgment was had between the ſame Parties in a Prohibition upon a Demurrer, *viz. Hill.* 2 *Jac.* 1. *B. R. Cornwallis* verſ. *Spurling.* See 2 *Cro.* 57. and *Moor* 913. and in *Urrey* and *Bowyer*'s Caſe, 2 *Brownl.* 8. and 20. It was holden by *Coke* and *Nicholls*, againſt *Winch* and *Warburton*, That a Purchaſer of Lands of St. *John*'s *of Jeruſalem* ſhould pay Tithes; and in the 18 *Jac.* 1. in *C. B.* all the

the Judges, but *Warburton*, held that the Purchaſer ſhould pay Tithes, as is ſaid *Paſ.* 3 *Car. B. R. Whittle* and *Weſton*'s Caſe. See *Noy* and *Godbo.* 392, and *Bendlo.* 168, and 185.

After which the Caſe was argued *ſeriatim* at the Bench, by all the four Judges in *B. R.* and *Whitlock* held, that the Lands were not diſcharged of Tithes, neither by the 31 *H.* 8. nor by the 32 *H.* 8. *Hide* Chief Juſt. held, That they were diſcharged by 32 *H.* 8. and not by 31 *H.* 8. And *Dodderidge* and *Jones* held, That they were diſcharged by the Clauſe of Diſcharge in 31 *H.* 8. Or if not by that, yet by 32 *H.* 8. So that of the four Judges, only *Whitlock* held, That ſuch Lands were not freed from the Payment of Tithes, and therefore Judgment was given, That no Tithes ſhould be paid of ſuch Lands, *viz.* whilſt manured by the King or his Patentee, and not let to others. See 1 *Jon.* 182. *Latch* 89. *Whitton* verſ. *Weſton.*

Lands freed from Tithes by 32 H. 8. cap. 24.

But it ſeems this Judgment did not abſolutely clear or ſettle the Point; for afterwards the ſame Matter came again into Queſtion, in the *King*'s *Bench*, at the Time when Sir *Matthew Hale* ſate as Chief Juſtice there, *viz. Trin.* 25 *Car.* 2. when it was adjudged by him, and the whole Court, That the Lands which came to the Crown by the Stat. 32 *H.* 8. *c.* 24. ſhould not pay Tithes, by Reaſon of the Words (Privileges, &c.) in that Statute. And in the Argument of this Caſe, all the Caſes before-mentioned were cited and conſidered, whereby that

Queſtion

Queſtion ſeems now at Reſt. See *Raymond* 225. 3 *Keb.* 208, 217. *Foſſet* ver. *Franklin.*

Stat. 37 H. 8. c. 4 *of Chanteries and Free Chapels.*

The next Statute (which is the Fourth in Order) that was made touching theſe Matters, was that of 37 *H.* 8. *c.* 4. For the King having, by the three former Statutes, gotten all the Lands as aforeſaid, both of the leſſer and of the greater Abbies and Monaſteries, and alſo thoſe of the Hoſpitals of St. *John of Jeruſalem*; the Parliament in the next Place proceeded to give to the King the Lands belonging to Colleges, Chanteries and Free Chapels, and to diſſolve theſe Corporations, *&c.*

Watſon 535.

It is true, what Mr. *Watſon* ſays, That no Caſe is to be met with in our Books of Law upon this Statute, but only upon that of 1 *Ed.* 6. *c.* 14. which he thinks to be the ſame with this. But the Reaſon why we have no Caſes reported hereon, appears in Mr. *Raſtall's* Abridgment of the Statutes, Tit. *Monaſteries*, where he ſays, That this Act was, That all Colleges, Chanteries, Free Chapels, *&c.* ſhould be in the King's *Diſpoſition during his Life* (only), in which were divers Articles concerning thoſe Chanteries, *&c.* But King *Henry*, during his Life, did not much by Force of that Act. And therefore (ſays *Raſtal*) I have not put that Act here, (*i. e.* in his Collection) it *expiring* with *the King's Life.*

Raſtal 272.

Stat. 1 Ed. 6. c. 14. *of Colleges, Free Chapels, and Chanteries, refers to that of* 37 H. 8.

Laſtly followed the Statute 1 *Ed.* 6. *c.* 14. which enacts, 'That all Manner of Col-'leges, Free Chapels and Chanteries, having 'Being or *'in eſſe* within five Years next be-'fore the firſt Day of this preſent Parlia-'ment,

'ment, which were not in the actual and 'real Poſſeſſion of the late King, nor in the 'actual and real Poſſeſſion of the King that 'now is, nor excepted in the ſaid former 'Act in the Form aforeſaid, (*viz.* the ſaid 'Act 37 *H.* 8.) other than ſuch as by the 'King's Commiſſions in Form hereafter-'mentioned, ſhall be altered, tranſported or 'changed, and all Manors, Lands, Tene-'ments, Rents, *Tithes*, *Penſions*, *Portions*, 'and other Hereditaments and Things a-'bove-mentioned belonging to them or any 'of them; and alſo all Manors, Lands, 'Tenements, Rents, and other Hereditа-'ments and Things above-mentioned, by 'any Manner of Aſſurance, Conveyance, 'Will, Deviſe, or otherwiſe had, made 'ſuffered, knowledged, or declared, given, 'aſſigned, limited or appointed to the find-'ing of any Prieſt, to have Continuance 'for ever, and wherewith, or whereby, 'any Prieſt was ſuſtained, maintained or 'found within five Years next before the 'firſt Day of this preſent Parliament, which 'were not in the actual and real Poſſeſſion 'of the ſaid late King, nor in the actual and 'real Poſſeſſion of the King that now is; 'and alſo all annual Rents, Profits and 'Emoluments at any Time within five Years 'next before the Beginning of this preſent 'Parliament, employed, paid or beſtow-'ed towards, or for the Maintenance, Sup-'portation, or finding of any ſtipendiary 'Prieſt, intended by any Act or Writing 'to have Continuance for ever, ſhall by the 'Authority of this preſent Parliament, im-

'medi-

Vide ante p. 177.

‘ mediately after the Feaſt of *Eaſter* next ‘ coming, *be adjudged and deemed, and alſo* ‘ *be in the very actual and real Poſſeſſion and* ‘ *Seiſin of the King our Sovereign Lord, and his* ‘ *Heirs and Succeſſors for ever*, without any ‘ Office, or other Inquiſition thereof, to be ‘ had or found, and in as large and ample ‘ Manner and Form as the Prieſts, Wardens, Maſters, Miniſters, Governors, Rulers, or other Incumbents of them, or any ‘ of them, at any Time within five Years ‘ next before the Beginning of this preſent ‘ Parliament, had, occupied or enjoyed, or ‘ now hath, occupieth or enjoyeth the ſame; ‘ and as though all and ſingular the ſaid ‘ Colleges, Free Chapels, Chanteries, Stipends, Sallaries of Prieſts, and the ſaid ‘ Manors, Lands, Tenements and Hereditaments, and other the Premiſſes whatſoever they be, and every of them, were in ‘ this Act, ſpecially, particularly, and certainly rehearſed, named and expreſſed, ‘ by expreſs Words, Names, Surnames, ‘ Corporations, Titles and Faculties, and ‘ in their Natures and Qualities: And over ‘ that it be enacted, *&c.* That where any ‘ Manors, Lands, Tenements, *Tithes*, *Penſions*, *Portions*, Rents, Profits, or other ‘ Hereditaments, by any Manner of Aſſurance, Conveyance, Will, Deviſe or otherwiſe, at any Time heretofore had, ‘ made, knowledged, ſuffered or declared, ‘ were given, aſſigned, or appointed to or ‘ for the Maintenance, Suſtentation, or ‘ finding of one Prieſt, or of divers Prieſts, ‘ for Term of certain Years, yet continuing,

'nuing, and that any Prieſt hath been 'maintained, ſuſtained, or found with the 'ſame, or with the Revenues or Profits 'thereof, within five Years laſt paſt, *That* 'the *King*, from the ſaid Feaſt of *Eaſter* 'next coming, *ſhall have and enjoy in every* 'Behalf, *for, and during all ſuch Time to* 'come, *all and every ſuch, and like Things,* 'Tenements, *Hereditaments, Profits and E-* 'moluments, *as the Prieſt or Prieſts, ought or* 'ſhould *have had for or towards his or their* 'Maintenance, *Suſtenance, or finding, and for* 'no longer *Time*, &c. with a like Clauſe for 'Lands, *Tenements or Hereditaments given* 'for *Anniverſaries, Obiits, Church or Chapel* 'Lamps, *Lights*, &c.' and divers other Clauſes for the like and other Purpoſes; all which are well worthy the Peruſal, but too long to be here inſerted.

That Colleges coming to the King by Stat. 1 Ed. 6. *came to him by that Statute only.* Quære.

Upon this laſt Statute the Caſe was, That the Maſter of a College (the Lands whereof came to the King by this Statute) held ſome of his Lands with a Rectory *ſimul & ſemel*, Diſcharged of Tithes at the Time of the making of this Statute, and of the Stat. 31 *H.* 8. and after the Statute made, the Farmer of the Rectory ſuing the Farmer of the Lands for the Tithes thereof, the Defendant ſhewed this Matter, and alledged the Branch of Diſcharge in the Statute of 31 *H.* 8. and it was reſolved, That the College, *&c.* that came to the King by the Stat. 1 *Ed.* 6. came to him by that Statute only, and not by the general Words in the Stat. 31 *H.* 8. *All Colleges*, &c. *which hereafter ſhall happen to be diſſolved, or by any other Means*

come

1. *Reaſon.* *come to the King's Highneſs*, &c. *ſhall be adjudg'd to be in the actual Poſſeſſion of the King*, &c.

Firſt, Becauſe the Words, *all other Means*, cannot be intended of an Act of Parliament, being after Words inferior thereto, as *Renouncing*, *Relinguiſhing*, *Forfeiture*, &c. an Act of Parliament being the higheſt Manner of Conveyance; upon which Reaſon it hath been adjudged, that Biſhops are not comprehended in the Stat. 13 *Eliz. c.* 10. by theſe general Words, *others holding Spiritual Promotions*; theſe Words being therein put after *Colleges*, *Deans and Chapters*, &c.

2. *Reaſon.* *Secondly*, Becauſe the ſaid Stat. 1 *Ed.* 6. enacts, *That all Colleges*, &c. *ſhall be by Force of that Act adjudged to be in the actual and real Poſſeſſion of the King*; and therefore (that Stat. ſo enacting) they cannot be in the King by the former Stat.

And in the ſame Caſe it was alſo adjudged, That the Branch in 31 *H.* 8. did not extend to any other Monaſteries than what came to the King by the Statute 31 *H.* 8. becauſe what would be given by another Statute, or that any thing would be given thereby, could not then be foreſeen.

Lands which came to the Crown by 1 Ed. 6. *not diſcharg'd by* 31 H. 8.

And that Lands which came to the Crown by the 1 *Ed.* 6. are not Diſcharged of Tithes by the Words of that Statute, *That the King ſhall have the Lands of Colleges*, &c. *in as large and ample Manner as the ſaid Prieſts, Wardens*, &c. *had or enjoyed the ſame.* For that theſe general Words ſhall not Diſcharge the Lands of any Tithes, becauſe they do not iſſue out of the Land, but are Things diſtinct from the Land. See 2 *Co.* 46. and *Moor*

Moor 240. the Archbiſhop of *Canterbury*'s Caſe. And yet *Tithes*, *Penſions*, *Portions*, &c. are therein expreſly mentioned. *Ideo Quære.*

Thus we have gone through the ſeveral Statutes relating to the Diſcharge of Tithes on the Diſſolution or Suppreſſion of Abbies, Monaſteries, Colleges, Chanteries, *&c.* we ſhall now conſider what Lands have been Diſcharged of Tithes by Reaſon of ſome Inherent Quality therein, whereof we have hinted ſomething in the Beginning of the former Chapter, and ſhall here add, what occurs with Reſpect to Barren Lands, Heath Lands, Improved Lands, Derelict Lands, or Lands gained from the Sea, Fenny Lands, Thorny Lands, *&c.*

Other Lands diſcharg'd of Tithes.

And here we may note, That as by the Acts *ſupra*, certain Lands are made perpetually Tithe-free; ſo by Statute 2 & 3 *Ed.* 6. *c.* 13. Barren Lands, after they are improved, *&c.* are diſcharged from the Payment of Tithes for a certain Time only. For in that Act is this Proviſo, *viz.* 'Provided al-'ways, and be it enacted by the Authority 'aforeſaid, That all ſuch Barren, Heath, 'or Waſte Ground, other than ſuch as be 'diſcharged for the Payment of Tithes by 'Act of Parliament, which before this 'Time have lain Barren and paid no Tithes, 'by Reaſon of the ſame Barrenneſs, and 'now be, or hereafter ſhall be improved and 'converted into Arable Ground or Mea-'dow, ſhall from henceforth, after the End 'and Term of Seven Years next after ſuch 'Improvement fully ended and determin'd, pay

For a Time &c.

Stat. 2 & 3 Ed. 6. c. 13. *Barren Lands improved.*

Note; it ſeems that before this Stat. Barren-Lands improved were generally Tithe-free.

'pay Tithes for the Corn and Hay growing 'upon the ſame, any Thing in this Act to 'the contrary thereof in any wiſe notwith-'ſtanding. (And alſo)

'Provided always, and be it enacted, '*&c.* That if any ſuch Barren, Waſte or 'Heath Ground, hath before this Time 'been charged with the Payment of Tithes, 'and that the ſame be hereafter improved 'or converted into Arable Ground or Mea-'dow, that then the Owner or Owners 'thereof ſhall, during the ſeven Years next 'following from and after the Improvement, 'pay ſuch Kind of Tithe as was paid for 'the ſame, before the ſaid Improvement, 'any Thing in this Act to the contrary in 'any wiſe notwithſtanding'.

Degg, *Pt.* 2. c. 19.

It is obſerved by Sir *S. Degg*, *&c.* That the former of theſe Clauſes was added for the Encouragement of Tillage, and Improvement of Lands by Water, or otherwiſe; and therefore though therein there are no direct Words of Diſcharge of the Payment of Tithes, during the firſt ſeven Years, yet by a reaſonable Intendment, the ſame ſhall be Diſcharged from the Payment of the Tithes of Corn and Hay, for the firſt ſeven Years after the Improvement made. See 2 *Inſt.* 656. *Dyer* 170.

Improved Lands, where Tithe-free, or not.

But the ſame Author, in his Notes on the *later Clauſe* ſays, It appears thereby that the Intent of the Law-Makers was only to free ſuch improved Lands from the Payment of ſuch Tithes as were produced by ſuch Improvement, which muſt be *Corn* and *Hay*, and

and no other; and for this cites *Plowd.* 204 and 396.

But I rather think the Law-Makers thereby intended only to preſerve the Cuſtomary Right or *Modus* of Payment, for ſuch Barren Lands as ſhould be improved into Arable or Meadow, for the firſt ſeven Years, and that afterwards Tithes in Kind ſhall be paid for ſuch Hay or Corn as were produc'd thereon.

And it is obſervable, That in neither of theſe Clauſes is there any Proviſion made for the Payment of any other Tithes, ſave thoſe of Hay and Corn. And conſequently all other Improvements, except into Arable and Meadow, are left Tithe-free by Virtue of this Act.

Sir *Simon* alſo puts the Caſe, Suppoſe a Man have Barren Lands within this Law, which are free from the Payment of Tithes by Preſcription, Real Compoſition, *&c.* it ſeems by the penning of this later Clauſe, that he ſhall pay Tithes for the ſame after ſeven Years, this Clauſe only providing for ſuch Lands as are freed by Act of Parliament. But that Doubt is cleared by the very Words of the Clauſe in this Act, which next precedes the two former, *viz.* 'That 'no Perſon ſhall be ſued, or otherwiſe com-'pelled to yield, give or pay any Manner 'of Tithes, for any Manors, Lands, Te-'nements, or Hereditaments, which by the 'Laws and Statutes of this Realm, or by 'any Privilege or Preſcription, are not 'chargeable with the Payment of ſuch

'Tithes, or that be diſcharged by any 'Compoſition Real.

From whence I conceive, That no Barren Lands improved, that belonged either to the Abbies or Monaſteries diſcharged by 31 *H.* 8, *&c.* as aforeſaid, or to any of the King's antient Demeſnes or Foreſt Lands, *&c.* ſhall, at the End of ſeven Years after ſuch Improvement, be charg'd with the Payment of Tithes. Nor ſhall any Barren Lands improved, belonging to any Manor, *&c.* for which Manor there is any general Preſcription or real Compoſition, be liable to pay any Tithes in Kind, notwithſtanding ſuch Improvement. For this laſt recited *Proviſo* preſerves all legal Diſcharges, either by the Common Law, or by any Statute, Privilege, or Preſcription.

What Heath and Barren Ground is intended by the Statute.

But the great Queſtion upon this Law has been, What ſhall be ſaid to be Barren, Heath, or Waſte Ground, within this Law? And Sir *Edward Coke* defines Barren Land thus: *Terra ſterilis eſt Terra infœcunda nullum ferens fructum, &c.* See 2 *Inſt.* 655, 656.

But *Degg* thinks that Definition will not hold in this Caſe (it ſeems he thinks it too general) for that it appears by the ſecond *Proviſo ſupra*, That ſuch Barren Lands were only intended, as were Barren *quoad agriculturam*, that is, ſuch Barren, Heath or Waſte Ground that of its own Nature, without Improvement by Lime, Marle, Manure, *&c.* will not bring forth either Corn or Hay. See *Dyer* 170.

And if the Ground be not fit for Tillage, yet it is ſaid, if it be not *ſuapte natura* Barren, it is not within this Law. As if a Wood be ſtubbed and grubb'd up, and ſo made fit for the Plough, and reduced to Tillage; yet it ſhall pay Tithes of Corn preſently, and not be diſcharged for ſeven Years from the Improvement. See 2 *Inſt.* 656. 3 *Bulſt.* 65. *Barren in its own Nature.*

But although ſuch Lands may bear ſome Fruit or Produce, yet if it be Barren *quoad agriculturam*, as to Tillage, which this Statute intended to advance, it is within this Act. *Ibid.*

And yet by *Richardſon*, if ſuch Land yielded before its Improvement any Profit, as if Sheep were kept thereon; or if it produced any other Profit that did yield Tithes, ſuch Tithes ſhall be paid, as hath been formerly paid thereof. *Hetl.* 147. and this by the expreſs Words of the *Proviſo* in the Statute.

But if the Land be truly Barren in its own Nature, although it paid before its Improvement for Tillage by extraordinary Charges, Tithes of Wool and Lamb, no other Tithes ſhall be paid thereof, than Tithes of Wool and Lamb, as before, and that by this Statute. *Dyer* 170, 171.

Note; If Barren Land, by Reaſon of Sheep, *&c.* kept thereon, might have yielded ſome Tithes, and yet no Tithes were paid thereof, if it be Land capable of a Diſcharge from the Payment of Tithes, of which this *Nonpayment* may be an Evidence, if ſuch Land by Charge and Induſtry be *Note.*

improved and made fruitful, yet it ſhall not pay any Tithes.

For the Improvement of Land not Tithable by Law, cannot make it become Tithable; for this were to alter the Law, and to make a Conſtruction contrary to the Intent of the Statute; which was to encourage Improvements by freeing ſuch Lands for ſeven Years, from paying Tithes, which elſe were liable; but not to charge any Lands with the Payment of Tithes, which by Law before the Improvement were Tithe-free. See *Stile's* Reg. 625.

Alſo note, That the Statute doth particularly except Lands diſcharged from the Payment of Tithes by Act of Parliament, Common Law or Preſcription, as aforeſaid, *i. e.* that ſuch Lands after ſeven Years Improvement, ſhall not be liable to the Payment of Tithes.

Lands Barren by Accident, and afterward improved.

But Mr. *Watſon* ſays, That if Land hath not paid Tithes within the Memory of Man, by Reaſon of its Barrenneſs occaſioned by Accident only, and not from its own natural Sterility, and the Owner or Occupier, with great Charges makes it fit for Tillage, Hay or Paſture; yet Tithes ſhall be preſently paid upon the Improvement thereof, without Reſpect to the Favour of this *Proviſo*.

Lands gained from the Sea, Qu. *If tithable.*

And therefore, ſays he, If Marſh or Sandy Land hath been covered with Salt Water, ſo that Time out of Mind no Graſs had been known to grow there, nor any Profit at all made thereof, until at Length by great Charges and Induſtry, this Ground has been gain'd from the Sea, by making coſtly

Banks, and Sea Walls, and continual repairing thereof; yet this, though yielding no Profit, as being Barren by Accident only, *viz.* Through the flowing of the Sea thereon, and not from its natural Barrenneſs, ſhall, as ſome conceive, have no Benefit of this Statute for ſeven Years, but ſhall pay a Tithe to the Parſon immediately; *ſed Quære de hoc?* For I conceive the Law to be otherwiſe in the Caſe of Derelict Lands, or Lands recovered from the Sea. (Except the Cuſtom of the Place may perhaps warrant a *Modus* in Lieu of Tithes for ſuch Lands). For as the Sea is within no Pariſh, how can the Land gained therefrom be ſaid to lie in any Pariſh? Or to whom of Common Right are the Tithes of ſuch Lands payable? But I conceive, that for Lands originally gained from the Sea, no Tithes are due or payable, either by Common Law, Cuſtom, or Preſcription. *The Author's Opinion.*

But I admit, with Mr. *Watſon*, That if Land has formerly paid Tithes, and the ſame Land is afterwards overflown for two, or three, or twenty Years together, though there the Parſon can have no Tithes for the Time it is ſo overflown, yet when the Land is regained, Tithes ſhall be paid thereof, as of other Lands, according to the Profit which it yields; and ſo it was agreed *per Cur.* 3 *Bulſt.* 65. and 1 *Roll. R.* 354. S. C. And it has been alſo adjudged, That Fenny Lands drained ſhall pay Tithes, notwithſtanding this Statute. See *Moor* 430, 909. and 3 *Cro.* 475. *Lands regained, and Fenny Lands drained.*

Thorny Lands. So if Lands have been full of Thorns and Buſhes, *&c.* Time out of Mind, and by Grubbing, *&c.* are made Arable or Meadow, Tithes ſhall preſently be paid thereof, notwithſtanding this Statute; for ſuch Lands are not Barren of their own Nature, but became ſo by Negligence and ill Huſbandry. 3 *Cro.* 475. *Moor* 909.

And *Coke* Ch. Juſt. ſaid, That it had been reſolved in one *Farringdon*'s Caſe, That Wood-ground is not Barren Ground within this Statute: And, That if one do ſtock or grub up Wood, and after convert it into Arable, though by this he has meliorated the Land, and that by great Coſt and Labour, yet he ſhall pay Tithes for this preſently, for that the Land in its own Nature is not Barren. 3 *Bulſt.* 65. And herewith *Dodderidge* agreed in the ſame Caſe. See 1 *Roll. Rep.* 354. 2 *Inſt.* 655.

Degg, Pt. 2. cap. 19. By *Degg*, if Lands were Barren, Heath or Waſte Ground, at the Time of the making of this Act, and were afterwards improved, and had, or might have had, the Benefit of this Law, and afterward return to their Barrenneſs, the Owner of ſuch Lands ſhall not have the Benefit of this Law, a ſecond Time, upon a ſecond Improvement. See 10 *Co.* 86. *b.* 6 *Co.* 18. *a.*

But the Law ſeems otherwiſe, if the Lands had been improved before the making of this Law, and were then become Barren again; for there, I take it, upon a new Improvement, the Owner of ſuch Lands ſhall have the Benefit of this Law.

And

Barren Land, how triable.

And note; all Queſtions of this Kind, Whether the Lands were Barren or not, are to be tried by a Jury at Common Law, and are not to be determined in the Spiritual Court. See 1 *Keb.* 253. and *Degg*, *Part* 2. *cap.* 19. *verſ. Finem.*

And therefore in a Suit for Tithes in the Spiritual Court, if the Defendant pleads, It is Barren Land, and that Plea be refuſed, or iſſue taken upon it, there a Prohibition ſhall be granted. But a Prohibition ſhall not be granted upon a Suggeſtion only, That it is Barren Land, before it be pleaded in the Spiritual Court. See 1 *Keb.* 387.

And note in the Caſe of *Strowd* and *Hopkins*, (which ſee in 1 *Jon.*) two Points were argued and agreed by four Judges in *B. R. viz.* (1.) When a Prohibition is brought on the ſaid Stat. *Ed.* 6. to ſtay a Court in the Spiritual Court for Tithes of *Barren Lands*, for the firſt ſeven Years, the Party ought to prove his Suggeſtion within ſix Months, or elſe a Conſultation ſhall go; and (2.) when a Conſultation is granted for that Cauſe, yet the Party may have a new Prohibition *upon the ſame Libel*; *for that the Stat.* 50 Ed. 3. doth not extend to a Conſultation granted upon the Non-probate of a Suggeſtion within ſix Months; but where it is granted upon the *Matter* of the Suggeſtion only. See *Repert. Canon.* 387.

CHAP. VIII.

Tithes originally cognizable in the Hundred, County, and other Temporal Courts; of Writs of Indicavit, *and Right of Tithes at Common Law; of the Beginning and Progreſs of Eccleſiaſtical Juriſdiction therein, and a Series of the ſeveral Statutes, &c. which confirm, limit, or enlarge that Juriſdiction,* viz. Circumſpecte agatis, Articuli Cleri. *Statute* 18 E. 3. c. 7. *Petitions in Parliament againſt Eccleſiaſtical Incroachments. Stat.* De Sylva cædua. *As alſo* 45 E. 3. c. 3. 1 R. 2. c. 13. *and* c. 14. 21 H. 8. c. 6. 27 H. 8. c. 20. 32 H. 8. c. 7. *and* 2 & 3 Ed. 6. c. 13. *With Obſervations on each Statute.*

Tithes in what Courts to be ſued for, &c.

HITHERTO in this Diſcourſe we have ſhewn the Nature, Kinds, Qualities, and Incidents of *Tithes*; to whom they are due,

due, and by whom payable, with the manner of Payment; what Lands are liable thereto, and what are diſcharged therefrom, with the Reaſon and Means of ſuch Diſcharges, both at the Common Law and by Acts of Parliament.

We come now, in the next Place, to ſhew in what Courts Tithes may, or ought to be ſued for and Recovered; and how, and in what manner ſuch Suits are to be proſecuted and defended in the ſaid Courts reſpectively, either Spiritual or Temporal.

Not originally in the Eccleſiaſtical.

And here in the firſt Place we may obſerve, That altho' it is commonly ſaid, That the Eccleſiaſtical Courts have the proper Juriſdiction of Tithes; yet that muſt be underſtood to relate only to thoſe Times, when in Conſequence of King *John*'s aliening his Kingdom to the Pope, the Eccleſiaſtical Courts, (which were originally of the Pope's Erection) claimed the ſole Cognizance of thoſe Cauſes. See *Prynn*'s Hiſt. of King *John* 71, 72, 89, 90, *&c.* and *Selden*'s Hiſt. of Tithes, *chap.* 21. And *vide infra.*

But in the Temporal.

For 'tis very evident from many antient Records and Hiſtories of this Kingdom, That Tithes, and other Eccleſiaſtical Duties were originally cognizable in the King's Temporal Courts, and that at Common Law, and of Common Right, whoever had any Right, Property, or Intereſt in Tithes, might Sue for the ſame in thoſe Courts. See 2 *Inſt.* 490, 661. *Seld.* Hiſt. of Tithes, 412. *Lamb. Saxon Laws*, 45, *&c.*

And

Viz. in the County and Hundred Courts.

And 'tis moſt true, what Mr. *Selden* and Sir *Edward Coke* obſerve, That in the *Saxon* Times Tithes were determinable in the *County* and *Hundred Courts*, where the Biſhop or his Deputy, and the Sheriff, or the King's Bailiff, ſate as Co-ordinate Judges, there being at that Time no ſeparate Court of Ordinary Eccleſiaſtical Juriſdiction, the Laity being then eſteem'd *Populus Dei*, as much as the Clergy, and had equal Votes with them in the Election of Biſhops, Archbiſhops, *&c.* and in the determining of the *Church's Rights*, *&c.*

Note.

When the Biſhops Courts were firſt Erected.

Mr. *Selden* has alſo ſhewn us, That the Biſhops Conſiſtory here in *England*, was introduced by *William* the Conqueror, and gives us the Writ or Charter, whereby the Court was firſt erected, and a ſeparate Juriſdiction thereby given to Biſhops, Archdeacons, *&c.* which ſeems done in Gratitude to the Clergy for their promoting his Claim, moſt of the Biſhopricks, Abbies, *&c.* being poſſeſs'd by *Normans* at the Time of his Arrival.

W. the Conquer's Charter.

That Charter runs thus, *Mando & Regia Authoritate præcipio, ut nullus Epiſcopus vel Archidiaconus De legibus Epiſcopalibus amplius in* Hundredo *placitum teneant, nec cauſam quæ ad Regimen animarum pertinet, ad Judicium Secularium hominum adducant; ſed quicunque ſecundum Leges epiſcopales de quacunque cauſa vel culpa interpellatus fuerit, ad Locum quem ad hoc Epiſcopus elegerit & nominaverit veniat, ibique de cauſa ſua reſpondeat, & non ſecundum (Juratores) Hundreti ſed ſecundum*

Eccleſiaſtical Courts erected.

tundum Canones & Leges Epiſcopales Rectum Deo & Epiſcopo ſuo faciat; and cloſes it thus, *Hoc etiam Defendo ut nullus Laicus Homo de Legibus quæ ad Epiſcopum pertinet ſe intromittat.* See *Selden ibid.* 413, 414. Lay Juriſdiction reſtrain'd.

But notwithſtanding this Charter, it ſeems, the Juriſdiction of Tithes was not ſo abſolutely ſettled in the Eccleſiaſtical, or Biſhops Courts, but ſtill ſome Suits for them were proſecuted and Recover'd thereon in the Temporal Courts, whereof Mr. *Selden* gives us ſome Inſtances, and more might be given in the Time of *H.* 1. who, in this particular, ſeems to have reſtored the antient *Saxon* Rule in the Recovery of Tithes.

and after reſtored by King H. 1.

For that King, whoſe Right was eſtabliſhed by the *Engliſh* in Oppoſition to the *Normans*, not only by his Charter reſtored to the People their former Laws and Rights, which had been broken and invaded by his Father and Brother; but alſo with Reſpect to Tithes provided by a new Law, (Declaratory of the old) *viz.*

Leges H. 1. cap. 11.

Si quis rectam decimam ſuperteneat vadat Præpoſitus Regis & Epiſcopi & Terræ Domini cum Presbytero & ingratis auferant & Eccleſiæ reddant, &c. i. e. If any Man with-holds or detains Tithes that are due, let the Sheriff or Officer, the Biſhop's Deputy, or Archdeacon, and the Lord's Steward or Bailiff, together with the Presbyter, or Parſon of the ſame, go and take them away, *i. e.* adjudge them from the Deteiner, and reſtore them to the Church, *&c.*

Here we ſee a Court for deciding Matters of Tithes compoſed of Laymen and Eccleſiaſticks,

ſiaſticks, ſimilar in Form to that of the *Saxons*. And that in thoſe Elder Times, *viz.* before and about the Reigns of King *H.* 2. *&c.* the King's Secular Courts originally held Plea of the Right of Tithes, is clear and evident from many infallible Proofs, which the Reader may find collected by Mr. *Selden* in the 14th Chapter of his *Hiſt. of Tithes.*

Temp. H. 2.

At length ſettled, in the Spiritual Courts with Reſtrictions.

But the reſtleſs Spirits of the Clergy of thoſe Times left no Stone unturn'd 'till they had brought this, and all other Matters they called the Church's Rights, within their own ſeparate Juriſdiction; ſo that at length it became a ſettled Point, That the Eccleſiaſtical Courts had the ſole Power to hold Plea of the Subſtraction, or with-holding of Tithes, (except in the King's Caſe) and this Claim of theirs ſeems favoured by divers Caſes in Law, and ſome Acts of Parliament, but ſtill with ſome Reſtriction, *&c.*

Stat. 18 E. 3. cap. 7.

Nor was this Claim of theirs ſubmitted to without great Reluctance in the Laity, as appears by the Statute 18 *E.* 3. *c.* 7. which recites, 'Whereas Writs of *Scire Facias* 'have been (often) granted to warn Pre'lates, Religious, and other Clerks to an'ſwer (for) *Diſms* (or Tithes) in our 'Chancery, and to ſhew, if they have any 'thing, or can any thing ſay wherefore ſuch 'Diſms (or Tithes) ought not to be reſto'red to the ſaid Demandants, and to an'ſwer as well to us, as to the Party for ſuch 'Tithes, (*It Enacts,*) That ſuch Writs from 'henceforth be not granted; and that the 'Proceſs

'Proceſs hanging upon ſuch Writs be annulled and repealed; and that the Parties 'be diſmiſſed from the Secular Judges for 'ſuch manner of Pleas; *Saving to us our 'Right, ſuch as we and our Anceſtors have 'had, and were wont to have of Reaſon.* In 'Witneſs whereof, at the Requeſt of the 'ſaid *Prelates*, to theſe Preſent Letters we 'have ſet our Seal. Dated at *London* the 8th 'Day of *July*, in the Year of our Reign of '*England* the 18th, and of *France* the 5th'.

I will not here argue againſt the Validity of this Act of Parliament, as 'tis commonly termed, but ſurely there ſeems ſome Craft in obtaining it; and the Exemplification, if not the Grant it ſelf, was made ſolely at the Requeſt of the *Prelates*, and ſeems to be the Effect of ſome Agreement or Compoſition between the King and them, without the Conſent of the Commons, *&c.* See *Fitz. Nat. Bre.* 30. *E.* 1 *Keb.* 110. *Vide poſt.* 311.

Juriſdiction of the Temporal Courts.

We might alſo here take Notice of the ſeveral Statutes of 13 *Ed.* 1. *cap.* 5. and 34 *Ed.* 1. *c.* — as alſo of 9 *Ed.* 2. *cap.* 1, 2, and 5. 45 *E.* 3. *cap.* 3. touching the Regulation of Suits for Tithes, which ſhew, That at that Time Suits for Tithes were not wholly in the Cognizance of the Spiritual Courts. See thoſe Statutes before mentioned, *pag.* 16, 17, 21, 22, & *Vide poſt.*

Between two Laymen.

And long after this, (as by a continued Series of Caſes from the Reign of *Ed.* 2. to that of *H.* 7. it appears) wherever the Right of Tithes was in Queſtion between two Laymen, or between a Clergyman and a Layman, there the King's Temporal Courts had

had Cognizance thereof. See 38 *E.* 3. 36. 39 *E.* 3. 23. 44 *E.* 3. 29. 2 *H.* 4. 15. 1 *H.* 6. 5 *H.* 6. 10. 20 *H.* 6. 17. 31 *H.* 6. 11. 2 *E.* 4. 5. 44 *Aſſ.* 25. *&c.*

Or one Lay, and the other a Parſon.

And ſo if the Queſtion was between the Farmer, Baily, or Servant of one Clergyman, and the Farmer, Baily, or Servant of another, or the other Clergyman himſelf; there, tho' the Diſpute appears in theſe Caſes to be concerning the Right of Tithes between the two Parſons, yet the King's Temporal Court ſhall not be ouſted of its Juriſdiction. For as much as it appears both Parties are not Clergymen. *Vide* 5 *H.* 6. 10. 50 *E.* 3. 20, *&c. ſupra.*

Contra, *if between two Parſons.*

But where the Conteſt was directly between two Clergymen, there the Juriſdiction of the Spiritual Court ſeems to have been as conſtantly admitted. See 14 *H.* 4. 17. 5 *H.* 5. 40. 38 *H.* 6. 21.

How that may be pleaded, &c.

So that if one Parſon ſhould bring an Action of Treſpaſs at the Common Law againſt another Parſon, for the taking or carrying away of Corn, or other Thing, ſet out for Tithes, the Defendant may by way of Plea ſhew, that the Goods in Queſtion were Tithes ſet forth, and ſevered from the nine Parts, and that he is Parſon of *Dale*, and that he, and all his Predeceſſors, Time out of Mind, have had thoſe Tithes as a Portion which belong'd to his Church; and that the Plaintiff, being Rector of the Pariſh where they grew, claims them as his Tithes; and demand Judgment, whether the King's Court will hold Plea; By ſuch

Plea,

Plea, 'tis ſaid, the King's Court ſhall be ouſted of Juriſdiction.

Bounds of Pariſhes, in the King's Courts.

But if the Diſpute in ſuch Action fall out to be about the Bounds of the two Pariſhes; or if it happens in pleading or otherwiſe, that ſuch Bounds, *&c.* are drawn in Queſtion, there the King's Court ſhall not be ouſted of its Juriſdiction.

Rights of Patronage in the Spiritual.

But it ſeems in all Caſes, where the Right of Tithes only is in Diſpute in the Spiritual Court, between one Parſon and another, in whoſe Names ſoever the Suit there is, there no Prohibition lies, *i. e. If both Parſons came in by the ſame Title* of *Patronage*; ſo that the Right of Patronage came not in Diſpute. See *Weſtminſter* 2. *c.* 5. 40 *E.* 3. 28. 35 *H.* 6. 29.

if claimed by the ſame Title.

And ſo ſeems the Law at this Day, if a Queſtion ariſes between the Parſon, who is Patron, and the Vicar, whether the Tithes belong to the one or the other of them, there no Prohibition lies, if both claim by the ſame Title. *Vide ibid. Noy* 147. *Moor* 907. *&c.*

And of leſs than a fourth Part, &c.

But where the Right of Tithes is controverted between two Clergymen, who come into their Churches by ſeveral Patrons, there the Spiritual Court hath no Juriſdiction to determine the Right, in Caſe the Tithes amount to the fourth Part of the yearly Value of the Church. But in ſuch Caſe the Title is to be determined in the King's Courts by a Writ of Right of Advowſon of Tithes. *Vide poſt*, and the Statutes *Circumſpecte agatis* and *Artic. Cleri* confirm this. Yet in that Caſe, if the Tithes in Queſtion do not amount

mount to the 4th Part of the yearly Value of the Church, the Eccleſiaſtical Court may determine the Right on a Writ of Spoliation. See *Fitz. Nat. Brev.* 37 *E.*

Spoliation.

And ſome think, That where the Parties contending are both Clergymen, and both Claim a Right to Tithes under one and the ſame Title, or Patron, there, tho' the whole Tithes come in Debate, yet the Title ſhall be determined in the Spiritual Court, by a Suit in the Nature of a Spoliation. See *Degg*, 371.

Of the Writ Indicavit.

And here give me Leave to add a few Words as to the Writ of *Indicavit* (or Prohibition at Common Law) relating to this Matter.

A Prohibition.

Some indeed have been of Opinion, that this Writ is grounded on the before mentioned Statutes of *Circumſpecte agatis* and *Articuli cleri*, *cap.* 2. But it is very clear, that this Writ lay at the Common Law; and by this Writ the Temporal Courts in thoſe Elder Times, more eſpecially reſtrained the Exorbitances of Eccleſiaſtical Juriſdiction.

It lay at Common Law.

And it appears in our Books, That very learned Judges were of Opinion, it lay in all Caſes, where the Right of Patronage might come in Diſpute; and herewith *Coke*, Ch. Juſt. ſeems to agree, in his 2 *Inſt. pa.* 364. See 4 *E.* 4. 27. *b. per Markham*, and 38 *H.* 6. 20. *per Moyle.*

In all Caſes of Right of Patronage, &c.

And *Bracton*, a learned Judge, who wrote in the Time of *H.* 3. and long before thoſe Statutes were made, ſays, that this Writ lies, *ſi contentio fuerit inter Rectores de aliquibus Decimis quæ æſtimari poſſunt uſque ad quartam*

Formerly, if for a 6th Part.

quartam quintam vel ſextam partem advocationis, ultra quam partem non extenditur Prohibitio, prout ſibi videtur, &c. Vide Bract. *Lib.* 5. *cap.* 4. *pag.* 402. *b.*

But whatever the Common Law was, it is now ſettled by the ſaid Statutes of *Circumſpecte agatis* and *Articuli Cleri, cap.* 2. That unleſs the Tithes in Demand be at leaſt of the fourth Part of the Value of the Church, this Writ of *Indicavit* will not lie. *Now for a fourth Part.*

The Words of *Articuli Cleri, c.* 2. are, *Si ſit contentio de Jure Decimarum originem habens de jure Patronatus, & earundem Decimarum Quantitas aſcendat ad quartam partem bonorum Eccleſiæ, Locum Habeat* Regia Prohibitio, *i. e.* this Writ of *Indicavit.* *By Stat. Articuli Cleri, c.* 2.

And this Writ lies where one Parſon demands Tithes againſt another Parſon, to the fourth Part of the Value of the Church, or more, *i. e.* where they come into the Church, or claim their Rights under ſeveral Patrons. For if they come in both by one Patron, then the Right of *Advowſon* cannot come in Queſtion; and by Conſequence this Writ will not lie. *Where it lies, &c.*

But ſuppoſe there be a Parſon with a Vicarage endowed, whereof the Parſon is Patron, and a Suit be for Tithes, as belonging to the Parſon, to the Value of a fourth Part of a Parſonage, but not to a fourth Part of the Parſonage and Vicarage: It ſeems in this Caſe, though the Vicarage is derived out of the Parſonage, and may again be reunited to it, that yet by Reaſon of the ſeveral Patrons, an *Indicavit* lies. *Vide F.N.B.* 45. *B. & C.* 12 *E.* 4. 13.

And when.

2 Inſt. 364.

And it is to be obſerved, That this Writ does not lie before the Libel, nor after a Definitive Sentence. For the Party that prays it, muſt ſhew a Copy of the Libel in the Court of Chancery before he can have it. But a common Writ of Prohibition may in many Caſes be had after Sentence in the Spiritual Court. See *Inſtit. Legalis, pa.* ——

Form of the Writ not altered.

And although the Law be at this Day reſtrained to a fourth Part of the Value of the Church, where before it extended to a ſixth, *&c.* yet the antient Form of the Writ ſtill remains, and is not altered by either of the ſaid Statutes. And therefore, if the Tithes in Demand be under a fourth Part of the Value of the Church, it muſt be ſhewn in Pleading, by the other Side. *Q. F. N. B.* 45. *B.* 2 *Inſt.* 364.

Pleadings.

It lies for a Vicarage, Offerings, &c.

And this Writ lies as well for Offerings as for Tithes. *Vide F. N. B.* 45. *B.* And there is a Note in the *Regiſter*, That it lies of a Vicarage or Prebend, *& alia Similia*, as well as a Rectory, and ſee the Form of the Writ, *F. N. B.* 30. *C. Reg.* 33, 36, *&c.*

Proceedings thereon.

When ſuch Writ is ſued and ſerved, and thereby the Proceedings in the Spiritual Court ſtayed, then the Plaintiff there is to ſue his Writ of Right of Advowſon of ſuch a Portion of Tithes as the Caſe requires, and this is given by the Statute of *Weſtminſter* 2, *cap.* 5. (made 31 *Ed.* 1.) *viz.*

Weſtminſter 2. c. 5. Ante 21.

Writ of Right of Advowſon.

Et cum per breve de Indicavit impeditur Rector alicujus Eccleſiæ ad petendas Decimas in Vicina parochia habeat Patronus Rectori ſic impedito

impedito Breve ad petendam advocationem Decimarum petitarum.

But this Writ (of Right of Advowſon) muſt be intended where the Patron has the Fee-ſimple of the Advowſon in him. *By whom,*

And note, the *Indicavit* is to be brought in the Name of the Patron and his Clerk, againſt the other Incumbent, that ſues in the Eccleſiaſtical Court, and his Patron; but the Writ of Right of Advowſon is to be ſued by the one Patron againſt the other; and the Patron Demandant ſhall alledge *Exples* taken by his Incumbent, both of great and ſmall Tithes. See *F. N. B.* 45. *B.* and 12 *E.* 4. 13. *b.* *and againſt whom.*

But if the Patron, againſt whom the *Indicavit* is ſued, be but Tenant in Tail, or Tenant for Life or Years, he cannot then maintain a Writ of Right, but muſt demand and appear to a Declaration upon an Attachment, and plead his Title, which muſt be proceeded in, and tried, as in Caſes of other Prohibitions. See *F. N. B.* 30. *B.* 2 *Inſt.* 364. *Tenant in Tail for Life or Years, how relieved.*

And when the Title of the Patronage is determined at the Common Law, then the Cauſe muſt be remitted to the Eccleſiaſtical Court, where Sentence muſt be given, according as the Law has determined the Right. *Proceedings remitted, &c.*

And this appears both by the ſaid Statute of *Weſtminſter* 2. *c.* 5. and alſo by the ſaid Writ of *Indicavit*, which is ſpecially founded thereon, *viz.* *Vobis Præcipimus ne placitum illud teneatis, donec diſcuſſum fue-*

rit in crria noſtra, ad quem illorum pertineat ejuſdem Eccleſiæ Advocatio. Vide ante 21. *Regiſter* 33, and 36.

But theſe Writs of *Indicavit*, and Right of Advowſon (as well as other Real Actions) are now grown almoſt obſolete, and are ſeldom put in Practice; and therefore I ſhall no further enlarge on the Nature thereof, or the Proceedings therein; but proceed to ſhew,

Of Statutes giving Juriſdiction to the Spiritual Courts.

What Statutes have given Juriſdiction to the Eccleſiaſtical Courts in Caſes of Tithes, *&c.* And as to this we may obſerve,

That although the Eccleſiaſtical Courts, for ſome Time after the Conqueſt, (as aforeſaid) ſometimes held Plea in Caſes of Subſtraction or with-holding of Tithes, yet the firſt Statute which granted or confirmed to them that Juriſdiction, was the beforementioned Statute of *Circumſpecte agatis*, made 9, or 13 *E.* 1. which Enacts.

Stat. Circumſpecte agatis. *9 or* 13 Ed. 1.

'That if any Rector demands againſt his 'Pariſhioners, Oblations and Tithes due 'and accuſtomed—Or if one Rector de'mands againſt another Rector, any Tithes, 'great or ſmall, ſo that it be not the 'fourth Part of the Value of the Church—'Alſo, If a Rector demands a Mortuary 'in ſuch Places where a Mortuary is ac'cuſtomed to be given—Or if any Prelate 'of any Church, or Patron of an Advow'ſon, demands of the Rector any Penſion 'due to him, all theſe demands are to be 'made in the Eccleſiaſtical Court, *&c.*' and concludes thus: *In omnibus prædictis Caſibus,*

Caſibus, habet Judex Eccleſiaſticus cognoſcere Regia Prohibitione non obſtante.

There has been formerly ſome Doubt, whether this be an Act of Parliament. But Sir *Edward Coke* and Mr. *Selden*, with others, do think it a good Statute. See their Arguments for it, 2 *Inſt.* 487. and *Seld.* Hiſt. of Tithes, 424, *&c.* *That it is a Statute,*

And *Secondly*, admitting it to be a good Act, it has been doubted, whether it extended further than the Dioceſe of *Norwich*; it being by the penning thereof, appropriated to that Dioceſe alone; but by the general Opinion it is held to extend to all other Dioceſes, and *Norwich* is only put for Example. See 2 *Inſt.* 487. *And extends to all* England.

And the prudent penning of this Law, by our Anceſtors, deſerves our Obſervation; it ſhews how careful they were to preſerve their own Rights, and to avoid the Incroachments of the Clergy, who in thoſe Days were very powerful. For, *Prudently penned. See* Deg. cap. 26.

Firſt, They would not give Way to the Canons, to deſtroy their Cuſtoms and Preſcriptions allowed by the Common Law; and therefore they give the Spiritual Judge a Juriſdiction of Tithes and Oblations *debitas & conſuetas* only. So that where the Cuſtom, *&c.* is denied, the Spiritual Courts can claim no Juriſdiction by Virtue of this Statute.

Secondly, Our Anceſtors would not expoſe their Rights of Patronage too far, to the Determination of Eccleſiaſtic Judges, and therefore this Condition is annexed,

Dummodo non petatur quarta pars valoris Eccleſiæ.

Mortuaries. And *Thirdly*, They would not ſubject themſelves to pay Mortuaries, according to the Determinations of the Canon Law, but with a *Ubi dari conſuevit*; ſo that if any Suit were in the Spiritual Court for Tithes, or Offerings, or Mortuaries, not due as well by Cuſtom as by the Common (Canon) Law, a Prohibition lay, notwithſtanding this Statute. And ſo it does at this Day, to the *Canoniſts great Regret.*

Book Caſes and Authorities explanatory of the Statute. But how far the Eccleſiaſtical Courts claimed or exerciſed a Juriſdiction by Virtue of this Statute, may be ſeen in the following Caſes and Authorities at Common Law, *viz.* as to *Mortuaries*, if due by Cuſtom, *&c. F. N. B.* 51 *&* 53. 10 *H.* 4. 2. *Fitz. Juriſdiction* 20. *Kelway* 110. *b.* 1 *Cro.* 237. 1 *Sid.* 263. 1 *Keb.* 919. 2 *Keb.* 835, 867. 3 *Keb.* 75. As to Penſions by Preſcription, *&c.* ſee 11 *H.* 4. 85. *F. N. B.* 41. 51. B. 3 *Cro.* 675. *Pop.* 23. *Noy* 16. 2 *Cro.* 217. 2 *Inſt.* 491, 492. and 1 *Sid.* 146. 2 *Keb.* 439, 562. 1 *Ventr.* 3, and 120. And as to *Oblations* and *Tithes due and accuſtomed*, ſee 13 *Co.* in the Caſe *De modo Decimandi*, 2 *Keb.* 41, 439, 802. 1 *Ventr.* 3, 120, 265, 274. 3 *Keb.* 523, 527, 562. Some of which Watſon 619. Authorities, with the Words of the Statute, Tithes due and accuſtomed, Mr. *Watſon* urges to prove, That a *Modus Decimandi* may be tried in the Spiritual Court; but admits the later (and better) Opinions to be, That wherever a Cuſtom is denied, in thoſe Courts, a Prohibition ſhall go.

And

And as to Suits between two Parſons, where the fourth Part of the yearly Value of the Church is not in Queſtion, we may here add, to what we have before ſaid on that Head, That in 38 *E.* 3. 6. it is ſaid, Where the Right of Tithes comes in Debate between two Parſons, the one claiming the Tithes as of Common Right, as within his Pariſh, *&c.* and the other to be diſcharged by Real Compoſition, *&c.* the Eccleſiaſtical Court ſhall have Juriſdiction of it; and ſo it ſeems agreed by *Coke* and *Bacon.* 13 *Co.* 39. in the ſaid Caſe *De modo Dec.* and further to prove this are cited, 38 *E.* 3. 5. *b.* 2 *Roll. Abr.* 308. N°. 2. and *Hetley* 60. See alſo *Goldsbo.* 149. 2 *Roll. Abr.* 310. N°. 2, 5, *&c.* and the Caſes in 2 *Bulſ.* 158. 3 *Keb.* 523, 527, *&c.*

The ſecond Statute, made concerning the Juriſdiction of the Eccleſiaſtical Courts in Caſes of Tithes, was the Statute commonly called *Articuli Cleri*, the Articles thereof being projected and drawn up by the Clergy. But ſee this Statute before recited in this Chapter, under the Head of *Indicavit, &c.* And as it only relates to the Tithes of new Mills, ſee that Matter treated of *ante* Chap. 4.

Stat. Articuli Cleri, 9 E. 2. c. 5.

Ante 304.

But we may here note, That the Clergy, by Virtue of this Statute, drew to themſelves the Tithes of new erected Mills, *i. e.* erected within their Time of Preſcription; whereas it appears, That of Common Right no ſuch Tithes were due. See 2 *Danv.* 590. *ante* 116, to 126.

Stat. 18 E. 3. c. 7. *greatly inlarges the Eccleſiaſtical Juriſdiction.* Q. *if an Act of Parliament,*

After this came the Stat. 18 *E.* 3. *c.* 7. which greatly enlarges the Juriſdiction of the Eccleſiaſtical Courts in Caſes of Tithes. See this Statute before recited in this Chapter, and note the Doubt *ibid.* Whether it be a good Act of Parliament, *&c.*

obtained by Art, &c.

But ſuppoſing it a good Act, yet it muſt be confeſſed, the Clergy at that Time, by Means of the Chancellor, practiſed ſome Art in obtaining it; and their Power and Practice about that Time became ſo exorbitant, as to demand and exact Tithes, by Proceſs of their own Court, for divers Things, which in their Nature were not Tithable. And this occaſioned divers Petitions and Complaints in almoſt every Parliament afterwards, as appears in 1 *Roll. Abr.* 636, 637, *&c. viz.*

Petitions in Parliament againſt Tithes of Wood.

Rot. Parl. 17 *E.* 3. N° 51. The Commons pray, That no Man be drawn in Plea in Court Chriſtian for Tithes of Wood or Underwood, unleſs in ſuch Places where ſuch Tithes have *uſed* to be given. *Anſwer,* Let it be done as hath *uſed to* be done before theſe Days.

Eccleſiaſtical Encroachments.

See 2 *Inſt.* 642. 2 *Roll. Rep.* 122. and *Palm.* 38 where the ſame Record is cited; and it is ſaid, That Tithes were not paid of Wood, 'till *Stradford* Archbiſhop of *Canterbury* in 17 *E.* 3. made a Conſtitution, that Tithes of Wood ſhould be paid within his Juriſdiction, *de Sylva cædua,* of which the Commons complained at the next Parliament, and every Parliament afterwards 'till 16 *Ric.* 2. See alſo *Lit. Rep.* 153. 2 *Leon.* 80.

So, *Rot. Parl.* 18 *E.* 3. N° 12. The Commons pray, That as a Conſtitution is made by the Prelates (*Note their Inſolence*) to take Tithes of all Manner of Wood, which Thing was never uſed; and that *Nieſs* (*i. e. Women Slaves*) and alſo *Wives*, might make Teſtaments; which is againſt Reaſon; that therefore it would pleaſe by him (*i.e.* the King) and his good Council, to ordain a Remedy. And that his People ſhould remain in the ſame State as they had been uſed to be in the Time of all his Progenitors: And that Prohibitions ſhould be granted to all thoſe who are impleaded of the Tithes of Wood, without having a Conſultation. (Note, *this claims an Exemption from all Tithes of Wood.*) But the King, by the Archbiſhop's Means, gave them only this Anſwer: The King Wills that Law and Reaſon be done; and yet theſe Words ſhew the King aſſented to what was reaſonable; and conſequently, ſo far it ought to have the Force of an Act of Parliament. *Note.* *Note.*

Again, *Rot. Parl.* 21 *E.* 3. N° 48. The Commons pray that whereas the Archbiſhops and Biſhops (it ſeems of both Provinces) had lately ordained a Conſtitution to give (or pay) *Tithes of Underwood ſold only*; *whereas before theſe Days* no Tithes were given (thereof) Now the People of Holy Church, by Force of the ſaid Conſtitution, take and demand Tithes alſo of Groſs Wood, as well as of Underwood ſold, and not ſold, (herein they extended their Claim with a Vengeance, even beyond their own Conſtitution) againſt what they have uſed Time out of *Note.*

Mind,

Mind, to the great Damage of the Common Law: For which they pray Remedy.

This Petition, inſtead of being anſwered by the King, as it ought, was only referred to the Archbiſhop of *Canterbury* and the other Biſhops, as appears by the Anſwer, *viz.* The Archbiſhop of *Canterbury* and other Biſhops have anſwered, That ſuch Tithe is not demanded by Reaſon of the ſaid Conſtitution, but of *Underwood.*

The Biſhops Judges in their own Caſe.

And *Rot. Parl.* 25 *E.* 3. *pars* 2. N° 17. The Commons prayed, That no Tithes ſhould be paid of Wood, but where it hath been uſed, and not of Groſs Wood. *Anſwer.* The King will adviſe.

Alſo *Rot. Parl.* 43 *E.* 3. N° 17. The Commons pray, That it be declared, in what Caſes Tithe of Wood or Underwood ought to be given of Right, in Places where it has not been given before theſe Days. And alſo, That it be put in certain, what Manner of Wood ought to be called *Sylva Cædua.* And that in Caſe any be impleaded in Court Chriſtian of Tithe of Wood, or Underwood, that a Prohibition be granted, and an Attachment thereon in Chancery, as well to the Judges as Parties, as is accuſtomed in other Caſes, without having a Conſultation. *Anſwer.* Let the *Statute in this Caſe ordain'd be held and kept.* But *quære* what Statute is intended, for this was before the Statute of *Sylva cædua.* *Quære* if 18 *E.* 3. N° 12. *ante.*

Chancery.

And *Rot.* 45 *E.* 3. N° 23. The *Earls*, Barons, Knights, and other of the Commons complain, That where they ſell their * Groſs Wood,

* *See* 2 Danv. 587.

Wood, of the Age of twenty, thirty, or forty Years, or of greater Age, to Merchants, to the Profit of themſelves; and in Aid of the King in his Wars, yet Parſons and Vicars of Churches implead and trouble the ſaid Merchants in Court Chriſtian for the Tithes of the ſaid Wood, naming it by theſe Words, *Sylva cædua*; whereby they cannot ſell their Wood at the true Price, to the great Damage of them, and of the Realm, of which they pray the King and his Council to apply a fit Remedy, and declare and interpret openly theſe Words, *Sylva cædua*; as to the Intent of the Commons, Underwood is compriſed in theſe Words, and not Trees of ſuch Age. *Anſwer*, Let there be a Prohibition granted, and an Attachment, as hath been uſed before theſe Days. See 2 *Danv. Abr.* 587. Sylva cædua.

And note; That upon this Petition the Statute *de Sylva Cædua* was made, 45 *E.* 3. *c.* 3. whereby it is ordained and eſtabliſhed, That a Prohibition in ſuch Caſe ſhall be granted, and an Attachment, *&c.* See *F.N. B.* 51. 2 *Leon.* 79. *Stat.* 45 E. 3. cap. 3. De Sylva cædua.

But it ſeems the Clergy uſed divers Shifts and Tricks to render this Statute void; and it ſeems it was declared void by the Spiritual Courts; for *Rot. Parl.* 47 *E.* 3. No 21. (*i.e.* at the next Parliament) All the Commons of the Realm pray, That as at the laſt Parliament held at *Wincheſter*, the Lords and Commons of the Land made their Complaint, That Parſons and Vicars of the Holy Church travailed them in Court Chriſtian, for the Tithes of great Wood, *ſcil.* of

of the Age of twenty Years and above, under Colour of this Word *Sylva cædua*, at their Requeſt it was ordained, That no Wood, which was or ſhould be of the Age of twenty Years or more ſhould be Tithable: And the Parſons of Holy Church intending and contriving, that this Ordinance ſhould not reſtrain them of their antient (unjuſt) Incroachment, ſurmiſing, That *this was not affirmed for a Statute*, they purſued in *Court Chriſtian*, contrary to the Ordinance aforeſaid, to the great Damage of the People: That it would pleaſe the King to affirm the ſaid Ordinance for a Statute to endure for the Time to come; and that a ſpecial Prohibition upon the ſame Statute ſhould be made thereof in *Chancery*, forbidding thoſe in *Court Chriſtian* to hold Plea of Tithes of Wood of the Age aforeſaid. *Anſwer*, Let there be ſuch a Prohibition granted, as hath been of antient Time. See 2 *Danv.* 588.

Becauſe, as I conceive, the Clergy refus'd their Aſſent.

I have produced theſe Records not only to prove the Incroachments of the Clergy of thoſe Times in the Caſe of Tithes; but alſo to ſhew how difficult it was to obtain Relief in Chancery againſt their Incroachments; the then Chancellors being Eccleſiaſticks, and conſequently too Partial to their own Order, as partly appears by the following Record relating to the ſame Matter, *viz.*

Rot. Parl. 2 *H.* 4. N° 29. The Commons in their Petition recite the ſaid Statute 45 *E.* 3. *c.* 3. and ſay, That notwithſtanding the

the ſaid Statute, Parſons and Vicars claim Tithes of all Manner of Wood, as before they were wont: *Becauſe that Conſultations in ſuch Caſes have ſo eaſily been granted in Chancery*, by Colour of this Word *Sylva cædua*: And therefore they pray, That the King would pleaſe to ordain, That no Conſultation be granted by theſe Words *Sylva cædua*, if ſo it be, that the Wood of which Tithes are claimed be of the Age of twenty Years, or more, at the Time of the cutting; and a Pain thereupon ordained in this preſent Parliament: *Anſwer*, Let it be done as hath been done before theſe Days. See 2 *Inſt.* 642, 643. *Plow.* 470. 1 *Roll. Abr.* 639. and the like in Effect is *Rot. Parl.* 2 *H.* 5. *pars* 2 N° 7. *ib.* 636.

Note. Chancery.

Alſo *Rot. Parl.* 5 *H.* 4. N° 66. The Commons pray, That whereas many of the Lieges of the King are often vexed and troubled by Parſons and Vicars of Holy Church, by Citations and Cenſures of ſaid Holy Church, for Tithes of *Stone* and *Slatt*, worked and drawn out of Quarries, of which no Tithes are (to be) paid: That he would pleaſe to grant, That if any Prohibition be made in the Caſe, that no Conſultation be granted to the contrary. This alſo ſhews the Practice of the then *Chancellors* to grant Conſultations, or Cogniſance even of Things not Tithable, to the Spiritual Court: And it alſo ſeems, That by the Chancellor and Biſhops Means, the King gave the Anſwer of *ſa aviſera*, and denied Relief to the Commons upon this *moſt juſt* Petition. See 1 *Roll. Abr.* 636. *D.* 4.

The Clergy extort Tithes of Stone and Slatt, &c.

Chancellor, &c.

The

Stat. 1 R. 2. cap. 13.

The next Statute that occurs, touching theſe Matters, after that of *Sylva cædua ſupra*, was that of 1 *R.* 2. *c.* 13. This was made by the Clergy's Influence; and as Sir *S. Degg* ſays, was for puniſhing of ſuch as indicted thoſe that ſued in the Spiritual Court for Subſtraction of Tithes, or compell'd them to deſiſt by Bonds, or otherwiſe. *But this Law is now altogether obſolete.* As alſo,

See Degg 373.

Stat. 1 R. 2. cap. 14. Vide ante, p. 23.

Chap. 14. of the ſame Parliament, *viz.*

'It is accorded, That at what Time any 'Parſon of the Holy Church be drawn in 'Plea in the Secular Court for his own Tithes 'taken by the Name of Goods taken away; 'and he which is ſo drawn in Plea, maketh 'an Exception, or alledgeth, That the Sub- 'ſtance and Suit of the Buſineſs is only up- 'on Tithes due of Right, and of Poſſeſſion, 'to his Church, or to another his Benefice, 'That in ſuch Caſe the general Averment 'ſhall not be taken without ſhewing ſpecial- 'ly, that the ſame was his Lay Chattle'.

Special Averment of Lay Chattle.

Stat. 21 H. 8. cap. 6. *of* Mortuaries.

After which we have no Statute about Tithes, Offerings, or other Church Revenues, till the Statute made 21 *H.* 8. *c.* 6. about *Mortuaries*, *&c.* (*Vide ant.* chap. 4.) But (as Mr. *Watſon* complains) this was made to the Prejudice, rather than the Advantage of the Church, and at a Time when divers other Laws were made for leſſening the Power and Intereſt of the Clergy, and (as he ſays) abated the Reverence People had either for them, or the Cenſures of the Church, and occaſioned the following Act, *viz.*

Stat. 27 *H.* 8. *c.* 20. which recites: 'For as much as divers Numbers of evil diſpoſed Perſons, inhabiting in ſundry Counties, Cities, Towns and Places of this Realm, having no Reſpect to their Duties to Almighty God, but againſt Right and good Conſcience, having attempted to ſubſtract and with-hold in ſome Places the Whole, and in ſome Places great Part of their Tithes and Oblations, as well Perſonal as Predial, due unto God and Holy Church, and purſuing ſuch their deteſtable Enormities and Injuries have attempted in late Time paſt, to diſobey, contemn, and deſpiſe the Proceſs, Laws and Decrees of the Eccleſiaſtical Courts of this Realm, in more temerous and large Manner than before this Time hath been ſeen; For Reformation of which ſaid Injuries, and for Unity and Peace to be preſerved amongſt the King's Subjects of this Realm, Our Sovereign Lord the King, being ſupreme Head on Earth, under God, of the Church of *England*, willing the Spiritual Rights and Duties of that Church to be preſerved, continued and maintained, *Hath ordained and enacted* by Authority of this preſent Parliament, That every of his Subjects of this Realm, *England*, *Ireland*, *Wales* and *Caleis*, and Marches of the ſame ſhall, according to the Eccleſiaſtical Laws and Ordinances of his Church of *England*, *and after the laudable Uſes and Cuſtoms of their Pariſh*, or other Place where he dwelleth or occupieth, yeild and pay his Tithes and Offerings, and other Duties of Holy

Stat. 27 H. 8. cap. 20. *againſt Subſtraction of Tithes*, &c.

'Holy Church; and that for ſuch Subſtrac-
'tions of any of the ſaid Tithes, Offerings,
'or other Duties, the Parſon, Vicar, Cu-
'rate, or other Party in that Behalf griev'd,
'may, by due Proceſs of the King's Eccleſi-
'aſtical Laws of the Church of *England*,
'convent the Perſon or Perſons offending
'before his Ordinary, *or other competent*
'*Judge* of this Realm, having Authori-
'ty to hear and determine the Right of
'Tithes, and alſo to compel the ſame Per-
'ſon or Perſons offending to do and yield
'their ſaid Duties in that Behalf; and in
'Caſe the Ordinary of the Dioceſe, or his
'Commiſſary, or the Archdeacon, or his
'Official, or any other competent Judge
'aforeſaid, for any Contempt, Contuma-
'cy, Diſobedience, or other Miſdemeanor
'of the Party Defendant, make Informati-
'on and Requeſt to any of the King's moſt
'Honourable Council, or to the Juſtices of
'Peace of the Shire where ſuch Offender
'dwelleth, to aſſiſt and aid the ſame Ordi-
'nary, Commiſſary, Archdeacon, Official or
'Judge, to order or reform any ſuch Per-
'ſon in any Caſe before rehearſed, That
'then he of the King's ſaid Honourable
'Council, or ſuch two Juſtices of the Peace,
'whereof one to be of the *Quorum*, to whom
'ſuch Information or Requeſt ſhall be made,
'ſhall have full Power and Authority, by
'Virtue of this Act to attach, or cauſe to
'be attached the Perſon or Perſons againſt
'whom ſuch Information or Requeſt ſhall
'be made, and to commit the ſame Perſon
'or Perſons to Ward, there to remain with-
'out

Quære The King's Vicar General.

'out Bail or Mainprize, 'till that he, or 'they ſhall have found ſufficient Surety to be 'bound by Recogniſance, or otherwiſe, be-'fore the King's ſaid Counſellor, or Juſtice 'of Peace, or any other like Counſellor, 'or Juſtice of Peace, to the Uſe of our 'ſaid Sovereign Lord the King, to give due 'Obedience to the Proceſs, Proceedings, 'Decrees and Sentences of the Eccleſiaſti-'cal Court of this Realm, wherein ſuch 'Suit or Matter for the Premiſſes ſhall 'depend or be: And, That every of the 'King's ſaid Counſellors, or two Juſtices of 'the Peace, whereof one to be of the *Quo-'rum*, as is aforeſaid, ſhall have full Power 'and Authority, by Virtue of this Act, to 'take, receive, and record Recognizances 'and Obligations in any of the Cauſes 'above written.

Proviſo for London.

'Provided, That this Act, nor any Thing 'therein, ſhall not extend to any Inhabi-'tants of *London*, for, or concerning any 'Manner of Tithe-Offering, or other Eccle-'ſiaſtical Duty grown and due to be paid 'or yielden within the ſame City, becauſe 'there is another Order made for the Pay-'ment of Tithes, and other Duties within 'the ſaid City.

Alſo lawful Actions, Defences, Appeals, Prohibitions, &c.

'Provided alſo, That every Perſon and 'Perſons, being Party or Parties, to any 'ſuch Suit, ſhall and may make, and have 'his, and their lawful Action, Demand or 'Proſecution, Appeals, Prohibitions, and all 'other their lawful Defences and Reme-'dies in every ſuch Suit, according to the 'ſaid Eccleſiaſtical Laws, and the Laws and

'Statutes of this Realm, in as ample and li-
'beral Manner and Form, as they or any of
'them might have had, if this Act had ne-
'ver been made, any thing in this Act a-
'bove written notwithſtanding.

For further making of Eccleſiaſtical Laws.

Provided alſo, *&c.* 'That this Act for
'recovering of Tithes, ne any Thing there-
'in contained, ſhall take Force and Effect,
'but only until ſuch Time as the King's
'Highneſs, and ſuch other thirty-two Per-
'ſons which his Highneſs ſhall name and
'appoint for the making and eſtabliſhing of
'ſuch Laws, as his Highneſs ſhall affirm and
'ratify to be called *The Eccleſiaſtical Laws*
'*of the Church of* England; and after the
'ſaid Laws ſo ratified and affirmed as afore-
'ſaid, that then the ſaid Tithes are to be
'paid to every Eccleſiaſtical Perſon, accor-
'ding to ſuch Laws, and not otherwiſe'.

This Act ſtill in Force.

But note; although ſuch a Body of Laws were drawn up accordingly, and are publiſhed under the Title of *Reformatio Legum Eccleſiaſticarum, &c.* yet for that they were not affirmed or ratified by the King as this Act directs, they were never received as Laws, and conſequently the ſaid Act of 27 *H.* 8. continues ſtill in Force. And it is likewiſe confirmed by the Stat. 1 & 2 *Ed.* 6. *c.* 13. *vide poſt. pag.* 334.

1. Note alſo, 1. That this Act extends to all Sorts of Tithes, Offerings, *&c.* Perſonal and Mix'd, as well as Predial.

Single Value, poſt. 336.

2. That he that will have the Benefit of this Law, muſt ſue for the ſingle Value only, and not for the double Value, as upon 2 *Ed.* 6.

3. That the Plaintiff in the Eccleſiaſtical Court may proceed upon this Act, for Contempt, Contumacy or Miſdemeanour, as well before as after Sentence.

4. That the Security taken upon this Act, may be as well by Bond as by Recognizance.

5. That the Tithes, and other Church Duties are to be paid according to the Eccleſiaſtical Laws, and the laudable Cuſtoms and Uſages of the Place. (Very cautious!)

6. The Suit is to be before ſuch Judge as hath Juriſdiction of the Cauſe, *i. e.* either Spiritual or Temporal. So *that it creates or enlarges no Juriſdiction.* *Note.*

After which Statute (ſays Mr. *Watſon*) upon the Diſſolution of Abbies, Tithes came to the King, and from him to divers Laymen, who by Courſe of the Eccleſiaſtical Laws could not ſue for them in the Eccleſiaſtical Courts. And having at that Time no Remedy for them in the Temporal Courts, (a Miſtake, as I have ſhewn) the following Act of 37 *H.* 8. was made for their Relief.

'Whereas divers and many Perſons, in- 32 H. 8. c. 7.
'habiting in ſundry Countries and Places of *Preamble.*
'this Realm, and other the King's Do-
'minions, not regarding their Duties to
'Almighty God, and to the King our So-
'vereign Lord, but in few Years paſt
'more contemptuouſly and commonly pre-
'ſuming to offend and infringe the good
'and wholeſome Laws of this Realm, and
'gracious Commandments of our ſaid So-
'vereign Lord, than in Times paſt have
'been ſeen or known, have not letten to

'ſubſtract and withdraw the lawful and accuſtomed Tithes of Corn, Hay, Paſturages and other Sort of Tithes and Oblations commonly due to the Owners, Proprietaries and Poſſeſſors of the Parſonages, Vicarages, and other Eccleſiaſtical Places, of and within the ſaid Realm and Dominions, being the more encouraged thereto, for that divers of the King's Subjects being Lay Perſons, having Parſonages, Vicarages and Tithes to them and their Heirs, or to them and to the Heirs of their Bodies lawfully begotten, or for Term of Life or Years, cannot by the Order and Courſe of the Eccleſiaſtical Laws of this Realm, ſue in any Eccleſiaſtical Court for the wrongful with-holding and detaining of the ſaid Tithes and other Duties, nor cannot by the Order of the Common Laws of this Realm have any due Remedy againſt any Perſon or Perſons, their Heirs or Aſſigns, that wrongfully detaineth or with-holdeth the ſame. By Occaſion whereof, much Controverſy, Suit, Variance and Diſcord is like to inſurge and enſue among the King's Subjects, to the great Detriment, Damage and Decay of many of them, if convenient and ſpeedy Remedy therefore be not had and provided.

(1.) *Tithes to be effectually ſet forth.*

'Wherefore it is ordained and enacted by our ſaid Sovereign Lord the King, and with the Aſſent of the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled, and by the Authority of the ſame, That all and ſingular Per-

'ſons of this his ſaid Realm, or other his 'Dominions, of what Eſtate, Degree or 'Condition ſoever he or they be, ſhall 'fully, truly and effectually divide, ſet 'out, yield or pay all and ſingular Tithes 'and Offerings aforeſaid, according to the 'lawful Cuſtoms and Uſages of the Pariſhes 'and Places where ſuch Tithes or Duties 'ſhall grow, ariſe, come or be due. And in 'Caſe that it ſhall happen any Perſon or 'Perſons, of his or their ungodly or per-'verſe Will and Mind, to detain and with-'hold any of the ſaid Tithes or Offerings, 'or any Part or Parcel thereof; then the 'Perſon or Perſons being Eccleſiaſtical or 'Lay Perſon, having cauſe to demand or 'have the ſaid Tithes or Offerings, being 'thereby wronged or grieved, ſhall and may 'convent the Perſon or Perſons ſo offend-'ing before the Ordinary, his Commiſſary, 'or other competent Miniſter or lawful 'Judge, having the Parties or their lawful 'Procurators before him or them, ſhall and 'may, by Virtue of this Act, proceed to 'the Examination, Hearing and Determi-'nation of every ſuch Cauſe or Matter, 'ordinarily or ſummarily, according to the 'Courſe and Proceſs of the ſaid Eccleſiaſti-'cal Laws; and thereupon may give Sen-'tence accordingly.

and recoverable by the Eccleſiaſtical Laws, &c.

'And in Caſe any of the Parties for any (2.) 'Cauſe or Matter concerning that Suit, 'do appeal from the Sentence, Order and 'definitive Judgment of the ſaid Ordinary 'or other competent Judge, as is aforeſaid, 'then the ſame Judge, by Virtue of this

Coſts ſecured upon an Appeal.

'Act, forthwith upon ſuch Appellation 'made, ſhall adjudge to the other Party 'the reaſonable Coſts of his Suit therein be- 'fore expended, and ſhall compel the ſame 'Party Appellant, to ſatisfy and pay the 'ſame Coſts ſo adjudged by compulſory 'Proceſs and Cenſures of the ſaid Laws 'Eccleſiaſtical, taking Surety of the other 'Party to whom ſuch Coſts ſhall be adjudg- 'ed and paid, to reſtore the ſame Coſts to 'the Appellant, if afterward the principal 'Cauſe on that Suit of Appeal ſhall be ad- 'judged againſt the ſame Party to whom 'the ſaid Coſts ſhall be yielden. And ſo 'every ordinary and competent Judge Ec- 'cleſiaſtical, by Virtue of this Act, ſhall ad- 'judge Coſts to the Party upon every Ap- 'peal to be made in any Suit or Cauſe of 'Subſtraction or Detention of any Tithes 'or Offerings, or in any other Suit to be 'made for or concerning the Duty of ſuch 'Tithes or Offerings.

(3) *Power to two Juſtices to commit the Offender.*

'And further, be it enacted, by the Au- 'thority aforeſaid, That if any Perſon or 'Perſons, after ſuch Sentence definitive gi- 'ven againſt them, obſtinately and wilful- 'ly refuſe for to pay their Tithes, or ſuch 'Sums of Money ſo adjudg'd, wherein they 'be condemned for the ſame, that then 'two Juſtices of the Peace for the ſame 'Shire, whereof one to be of the *Quorum*, 'ſhall have Authority by this Act, upon In- 'formation, Certificate or Complaint to 'them made by Writing, by the ſaid Eccle- 'ſiaſtical Judge that gave the ſame Sen- 'tence, to cauſe the ſame Party ſo refuſing

'to

'to be attached and committed to the next 'Gaol, and there to remain without Bail 'or Mainprize, 'till he or they ſhall have 'found ſufficient Sureties to be bound by 'Recognizance, or otherwiſe, before the 'ſame Juſtices, to the Uſe of our Sove-'reign Lord the King, to perform the ſaid 'definitive Sentence and Judgment.

(4.) *Perſons, &c. diſcharged.*

'Provided always, and be it enacted by 'the Authority aforeſaid, That no Perſon 'or Perſons ſhall be ſued, or otherwiſe com-'pelled to yield, give or pay any Manner 'of Tithes, for any Manors, Lands, Tene-'ments or other Hereditaments, which by 'the Laws or Statutes of this Realm are 'diſcharged from, or not chargeable with 'the Payment of any ſuch Tithes.

Proviſo *for Inhabitants in* London.

'Provided alſo, *&c.* That this Act, nor 'any Thing therein contained, ſhall in any 'wiſe bind the Inhabitants of the City of '*London*, and Suburbs of the ſame, for to 'pay their Tithes and Offerings within the 'ſame City and Suburbs, otherwiſe than 'they ought or ſhould have done before the 'making of this Act, any Thing herein to 'the contrary notwithſtanding.

Remedy in the Temporal Courts for Perſons diſſeiſed, &c.

'And further enacted, *&c.* That in all 'Caſes where any Perſon or Perſons which 'now have, or which hereafter ſhall have 'any Eſtate of Inheritance, Freehold, Term, 'Right or Intereſt, of, in or to any Par-'ſonage, Vicarage, Portion, Penſion, Tithes, 'Oblations or other Eccleſiaſtical or Spiri-'tual Profit, which now be, or which here-'after ſhall be made Temporal, or admitted 'to be, abide and go to, or in Temporal

‘ Hands, and Lay Uſes, and Profits, by the
‘ Law and Statutes of this Realm, ſhall here-
‘ after fortune to be diſſeiſed, deforced,
‘ wrong'd or otherwiſe kept or put from their
‘ lawful Inheritance, Eſtate, Seiſin, Poſſeſſion,
‘ Occupation, Term, Right or Intereſt of,
‘ in or to the ſame, or of, in or to any
‘ Parcel thereof, by any other Perſon or
‘ Perſons, claiming or pretending to have
‘ Intereſt or Title, in or to the ſame, That
‘ then in all and every ſuch Caſe or Caſes,
‘ the Perſon or Perſons ſo diſſeiſed, defor-
‘ ced or wrongfully kept, or put from his
‘ or their Right or Poſſeſſion, as is afore
‘ rehearſed, their Heirs, Wives and ſuch
‘ other to whom ſuch Injury and Wrong
‘ ſhall be done or committed, ſhall and may
‘ have their Remedy in the King's Tem-
‘ poral Courts, or other Temporal Courts,
‘ as the Caſe ſhall require, for the Recovery,
‘ getting or obtaining of ſuch Inheritance,
‘ Eſtate, Freehold, Seiſin, Poſſeſſion, Term,
‘ Right or Intereſt, by Writs Original of
‘ *Præcipe quod reddat*, Aſſiſe of Novel Diſ-
‘ ſeiſin, Mortdanceſtor, *Quod ei deforceat*,
‘ Writs of Dower, or other Writs original,
‘ as the Caſe ſhall require, to be deviſed and
‘ granted in the King's *Court of Chancery*,
‘ of every ſuch Parſonage, Vicarage, Por-
‘ tion, Penſion or other Profit called *Eccleſi-*
Note. ‘ *aſtical* or *Spiritual*, ſo to be demanded,
‘ according to the Nature and Cauſe of the
‘ Suit thereof, in like Manner and Form,
‘ as they ſhould, ought, or might have had
‘ of or for Lands, Tenements, or other He-
‘ reditaments, in ſuch Manner to be de-
‘ manded,

'manded; and that *Writs of Covenant*, and 'other Writs for *Fines* to be levied, and all 'other Aſſurances to be had, made or con-'veyed (conceived) of any ſuch Parſonage, 'Vicarage, Portion, Penſion, or other Pro-'fit, called Eccleſiaſtical or Spiritual, as is 'aforeſaid, ſhall be hereafter deviſed and 'granted in the ſaid Chancery, according as 'hath been uſed for Fines to be levied, and 'Aſſurances to be had or made, or convey-'ed (conceived) of Lands, Tenements, or 'other Hereditaments: And that all Judg-'ments to be given upon any of the ſaid 'Writs original, ſo to be deviſed, or grant-'ed of or for any of the Premiſſes, or any of 'them, and all Fines to be levied and ac-'knowledg'd in any of the King's ſaid Courts 'thereof, ſhall be of like Force and Effect 'in the Law to all Intents and Purpoſes, 'as Judgments given, and Fines levied of 'Lands, Tenements and Hereditaments, in 'the ſame Courts upon Writs original, 'therefore duly purſued and proſecuted, 'albeit no ſuch Forms of Writs original 'out of the ſaid Court of Chancery have 'heretofore proceeded, or been awarded.

Remedy a-gainſt the Refuſers of Tithes in the Spiritual Courts.

'Provided always, That this laſt Act 'ſhall not extend, nor be expounded, to 'give any Remedy, Cauſe of Action or 'Suit in the Courts Temporal, againſt any 'Perſon or Perſons, which ſhall refuſe or 'deny to ſet out his or their Tithes, or which 'ſhall detain, with-hold, or refuſe to pay 'his Tithes or Offerings, or any Parcel 'thereof: But that in all ſuch Caſes, the 'Perſon or Party, being Eccleſiaſtical or

'Lay

'Lay Perſon, having Cauſe to demand or 'have the ſaid Tithes or Offerings, and 'thereby wronged, or grieved, ſhall take 'and have their Remedy for their ſaid 'Tithes or Offerings, in every ſuch Caſe, 'in the Spiritual Courts, according to the 'Ordinance in the firſt Part of this Act 'mentioned, and not otherwiſe, any thing 'herein expreſſed to the contrary thereof 'notwithſtanding'.

Degg *Pt.* 2. c. 26. Note; upon this Act Sir *S. Degg* obſerves,

1. That it appears by the Preamble to be principally deſigned for Relief of Lay Impropriators, who before this Act were not capacitated to ſue in the Spiritual Courts for the Subſtraction of Tithes, and were hard put to it to find any other Relief.

2. Where by the former Act the Party for *Contumacy*, *&c.* might be compelled to give Security before Sentence. Now hereby, in the Caſe of Lay Impropriators, the Party cannot be compelled to give Security till after definitive Sentence.

3. By this Statute, there muſt be two Sureties at the leaſt; but upon the former Act one Surety ſufficeth.

4. The Security in this Act, as well as on the former, may be either by Bond, or by Recognizance.

5. He that will ſue upon this Act, muſt ſue for the ſingle only, and not for the double Value, as upon 2 *Ed.* 6. See *Hardr.* 5.

6. That

6. That this Act, as well as the former, extends to all manner of Tithes and Offerings. *Quære & vide infra.*

7. That *London* is excepted out of this Act, as it was out of the former.

8. That this only extends to cuſtomary Tithes, and not for Tithes due by Canon and Eccleſiaſtical Laws.

9. That it only extends to ſuch as ſhall obſtinately and wilfully refuſe to perform the Sentence of the Eccleſiaſtical Judge, and for no other Contempt or Neglect.

10. That this Act reſtrains the Suit (for not ſetting forth or detaining, *&c.* of Tithes, *&c.*) to the Eccleſiaſtical Courts; whereas otherwiſe an Action would have lain at Common Law.

But divers Defects appearing in the above Statute, with reſpect to Lay Impropriators, they afterwards obtained a more effectual Law for their Purpoſe, *viz.* Stat. 1, 2 *Ed.* 6. *cap.* 13. of which hereafter.

Alſo Note; by my Lord *Coke*'s Opinion, 1 *Inſt.* 159. *a.* The above Statute does not only give Remedy in the Temporal Courts for *Tithes*, but alſo for *Penſions*, and other *Eccleſiaſtical or Spiritual Profit*, where the Lay Owner is diſſeiſed, deforced, wronged, or otherwiſe kept, or put from the ſame. See the Words in the Statute *ſupra.* Alſo for that Tithes, and other Eccleſiaſtical Duties, which came to the Crown by 27 *H.* 8. 31 *H.* 8. 37 *H.* 8. & 1 *Ed.* 6. are by thoſe Statutes, and this of 32 *H.* 8. and 1 & 2 *Phil.* and *Mar.* in the Hands of Laymen, now become meer Temporal Inheritances, and

It extends to Penſions, &c.

and ſhall be Aſſets; Husbands ſhall be Tenants by Curteſy, and Wives endow'd of them, and have other Incidents of Temporal Inheritances; only by this Statute they ſtill retained this Eccleſiaſtical Quality, That the Owner might ſue for Subſtraction thereof in the Spiritual Court.

Where a Prohibition *as to* Coſts taxed.

And further Note; although by this Statute the Appellant ſhall pay Coſts of Suit to the other Party, yet it has been ruled, That if Sentence be given in the Spiritual Court, and Coſts there taxed, and the Defendant brings an Appeal, yet if the Suit did not appertain originally or properly to them, a Prohibition ſhall be awarded as well to the Coſts as to the principal Suit. For that the *Statute* is to take Place only when the Cauſe properly belongs to the Spiritual Court. *Noy* 137.

And accordingly the Caſe was, *A.* Parſon of *B.* ſued for Tithes in the Spiritual Court; and *C.* the Rector of *D.* came in *pro Intereſſe ſuo* there, and ſaid, That the Lands, for which the Tithes are demanded, were within his Pariſh, upon which they were at Iſſue, and it being found for him, Sentence was accordingly given for him: *A.* Appeals, *&c.* and pending the Appeal, Coſts were aſſeſs'd againſt him in the firſt Court, according to this Statute, and Proceſs thereupon awarded. In this Caſe *A.* (becauſe the Iſſue was triable only at Common Law) brought a Prohibition to the firſt Court, from which he had appealed; but becauſe no Suit was there depending, for that he had removed thence by Appeal, a Conſultation was awarded;

warded; and held, that they might well proceed for the Coſts: But if he had not removed his Suit by Appeal, a Prohibiton had been maintainable for him as to the Coſts, as well as for the Principal, altho' he was Party to the Libel. See 3 *Cro.* 178. and 1 *Leon.* 130. *Tranſam*'s Caſe.

Prohibition if ſued contrary to the Statute.

So alſo, if any one be ſued or drawn into the Spiritual Court for any Matter, contrary to the ſaid Statute, a Prohibition lies, as in *White*'s Caſe, 3 *Cro.* 151.

A. Subſtracts Tithes in one Dioceſe and removes into another, &c.

But ſee the Caſe of *Machin* verſ. *Maultin*, *Mich.* 11 *W.* 3. in *B. R.* 5 *Mod.* 450. and 2 *Salk.* 549. where, in a Declaration on a Prohibition, the Caſe was, *A.* living in *Nottingham* within the Province of *York*, there ſubſtracted Tithes, and then removes into *Lincolnſhire* within the Province of *Canterbury*, and afterwards he happen'd to go to *York*, and was there ſued in the Court of the Archbiſhop for the ſaid Subſtraction, and obtained a Prohibition on the ſaid Stat. 32 *H.* 8. for citing him out of the Dioceſe, &c. but after Debate, a Conſultation was awarded. For that the Subſtraction of Tithes is Local, and muſt be ſued before the Ordinary of the Place where the Wrong was done; but 'tis otherwiſe in Caſes Tranſitory, *ubi Forum ſequitur Reum*; and in this Caſe is was urged by the Counſel, That this is not a Citing out of the Dioceſe within the Statute; becauſe the Dioceſe where he lived had not Juriſdiction; and if he might not be cited in this Caſe, the Fact would be Remedileſs and Diſpuniſhable. See *Godb.* 191.

Subſtraction of Tithes is Local.

1 *Roll. R.* 328. 1 *Cro.* 97. 13 *Co.* 4. 2 *Brownl.* 12. 28. 2 *Rol. R.* 428. *Winch.* 570. 3 *Mod.* 211.

Defects of 27 and 32 H. 8. ſupplied by 2 & 3 Ed. 6. for Payment of Tithes, &c.

But divers Defects in the ſaid Statutes of 27 *H.* 8. *c.* 20. and 32 *H.* 8. *c.* 7. afterwards appearing (eſpecially as to the Relief of *Lay Impropriators*, who were never favoured in the Eccleſiaſtical Courts,) a further Proviſion was made for Regulating and Enforcing the Payment of Tithes, *&c.* by Stat. 2 & 3 *Ed.* 6. *c.* 13. which recites, *viz.*

The two laſt Acts confirm'd.

'Whereas in the Parliament holden at '*Weſtminſter* the 4th Day of *February*, in 'the 27th Year of the Reign of the late 'King, of moſt famous Memory, King *H.* 'the 8th, there was an Act made concern-'ing the Payment of Tithes Predial and 'Perſonal: And alſo in another Parliament 'holden at *Weſtminſter* the 24th Day of *Ju-'ly*, in the 32d Year of the Reign of the 'ſaid King *H.* the 8th, another Act was 'made concerning the true Payment of 'Tithes and Offerings: In which ſeveral 'Acts, many and divers Things be omit-'ted, and left out, which were convenient, 'and very neceſſary to be added to the 'ſame: In Conſideration whereof, and to 'the Intent the ſaid Tithes may be hereaf-'ter truely paid, according to the Mind of 'the Makers of the ſaid Acts, Be it *Or-'dained and Enacted by*, *&c.* That not only 'the ſaid Acts made in the ſaid 27 and 32 'Years of the Reign of the ſaid King *H.* 8. 'concerning the true Payment of Tithes, 'And every Article and Branch therein con-'tained, ſhall abide and ſtand in their full 'Strength and Virtue; But alſo be it fur-

'ther

'ther Enacted, by the Authority of this preſent Parliament, That every of the King's Subjects ſhall from henceforth truly and juſtly, without Fraud or Guile, divide, ſet out, yield, and pay all manner of their Predial Tithes in their proper Kind, as they riſe and happen in ſuch Manner and Form, as hath of Right been yielded, and paid within forty Years next before the making of this Act, or of *Right or Cuſtom* ought to have been paid: And that no Perſon ſhall from henceforth take, or carry away any ſuch, or like Tithes, which have been yielded or paid within the ſaid forty Years, or of Right ought to have been paid in the Place, or Places tithable of the ſame, before he hath juſtly divided, or ſet forth for the Tithes thereof, the tenth Part of the ſame, or otherwiſe agreed for the ſame Tithes with the Parſon, Vicar, or other Owner, Proprietor, or Farmer of the ſame Tithes, under the Pain of Forfeiture of treble Value of the Tithes ſo taken and carried away.

Tithes to be ſet out, without Fraud, and not carried away.

On Forfeiture Cuſtom controuls Common Right. *of treble Value.*

'And be it alſo Enacted by the Authority aforeſaid, That at all Times, whenſoever, and as often as the ſaid Predial Tithes ſhall be due, at the Tithing Time of the ſame, it is to be lawful to every Party to whom any of the Tithes ought to be paid, or his Deputy, or Servant, to view, and ſee their ſaid Tithes to be juſtly and truly ſet forth and ſevered from the nine Parts, and the ſame quietly to take and carry away: And if any Perſon carry away his Corn or Hay, or his other Predial

Liberty to ſee the Tithes ſet out.

Diſturbers, &c to pay double Value & Coſts.

'dial Tithes, before the Tithe thereof be 'ſet forth, or willingly withdraw his Tithes 'of the ſame, or of ſuch other Things 'whereof Predial Tithes ought to be paid, 'or do ſtop, or let the Parſon, Vicar, Pro-'prietor, Owner, or other their Deputies or 'Fermers to view, take and carry away 'their Tithes, as is aboveſaid, by Reaſon 'whereof the ſaid Tithe or Tenth is loſt, 'impaired, or hurt, that then upon due 'Proof thereof made before the Spiritual 'Judge, *or any other Judge to whom hereto-'fore* he might have made Complaint, the

Double Value.

'Party ſo carrying away, withdrawing, let-'ting or ſtopping, ſhall pay the double Va-'lue of the Tenths or Tithe ſo taken, loſt, 'withdrawn, or carried away, over and

Ante 322.

'beſides the Coſts, Charges and Expences 'of the Suit in the ſame. The ſame to be 'recovered before the Eccleſiaſtical Judge, 'according to the King's Eccleſiaſtical Laws.

Note.

Note; this Paragraph, as *to the double Value, extends only to Predial Tithes, as Corn, Hay, Wood, Flax, Hemp, Fruit,* &c. *but as for mixt and perſonal Tithes, there is a* Proviſion *afterwards in this Act.* Vide ante Cap. 3 and 4.

There is alſo another Proviſo therein (as there is in the former Act,) which reſtrains *all Suits for Subſtraction of Tithes to be ſued in the Eccleſiaſtical Court*; and *that it ſhall not be lawful to ſue any With-holder of Tithes, Obventions,* &c. *in any other Court*; and *that if the Eccleſiaſtical Judge ſhall give Sentence,* no Prohibition or Appeal depending, *and the Party do not obey the Sentence, That then ſuch Judges*

Judges may excommunicate the Party; and if be wilfully ſtand excommunicated by the Space of forty Days next after the Publication thereof in the Pariſh Church of the Place or Pariſh where the Party excommunicated is Dwelling or moſt abiding, then the Judge Eccleſiaſtical may certify the King in Chancery, and require Proceſs of Excommunicato capiendo. Excommunication.

Note; this Clauſe extends to all manner of Tithes, Offerings, Obventions, and other Church Profits, but gives no double Damages for them, as the Clauſe *ſupra* does in the Caſe of Predial Tithes: After which follows this Clauſe in Reſtraint of Prohibitions, *viz.*

'That if any Party at any Time hereafter, for any Matter or Cauſe before rehearſed, limitted, or appointed by this Act to be ſued or determined in the King's Eccleſiaſtical Court, or before the Eccleſiaſtical Judge, does ſue for any Prohibition in any of the King's Courts, where Prohibitions before this Time have been uſed to be granted, that then in every ſuch Caſe the ſame Party, before any Prohibition ſhall be granted to him, or them, ſhall bring and deliver to the Hands of ſome of the Juſtices, Judges of the ſame Court where ſuch Party demanded Prohibition, the very true Copy of the Libel depending in the Eccleſiaſtical Court, concerning the Matter wherefore the Party demandeth the Prohibition, ſubſcribed, or marked with the Hand of the ſame Party; and under the Copy of the ſaid Libel ſhall *Prohibitions reſtrained.* *Copy of the Libel to be delivered.*

And the Suggeſtion to be proved within ſix Months, or a Conſultation, w th double Coſts, &c.

'be written the Suggeſtion wherefore the 'Party ſo demandeth the ſaid Prohibition; 'and in Caſe the ſaid Suggeſtion, by two 'honeſt and ſufficient Witneſſes at the leaſt, 'be not proved true in the Court, where 'the ſaid Prohibition ſhall be ſo granted, 'within ſix Months next following after the 'ſaid Prohibition ſhall be ſo granted and 'awarded, That then the Party that is let-'ted or hindred of his, or their Suit in the 'Eccleſiaſtical Court by ſuch Prohibition, 'ſhall upon his, or their Requeſt or Suit, 'without delay have a Conſultation granted 'in the ſame Caſe, in the Court where the 'ſaid Prohibition was granted, and ſhall al-'ſo recover double Coſts and Damages a-'gainſt the Party that ſo purſued the ſaid 'Prohibition: The ſaid Coſts and Damages 'to be aſſigned or aſſented (aſſeſſed) by the 'Court where the ſaid Conſultation ſhall be 'ſo granted; for which Coſts and Damages 'the Party, to whom they ſhall be awarded, 'may have an Action of Debt by Bill, 'Plaint, or Information, in any of the 'King's Courts of Record, wherein the De-'fendant ſhall not wage his Law, nor have 'any Eſſoin or Protection, &c.

But, notwithſtanding the Proviſions aforeſaid, there are divers other Clauſes in the ſaid Act of 1 & 2 *Ed.* 6. which, 'tis ſaid, have given Ground to many Prohibitions, as among others theſe two Clauſes, *viz.*

That no Perſon ſhall be ſued, or otherwiſe compelled to yield, give, or pay any Manner of Tithes for any Manors, Lands, Tenements,

or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Preſcription, are not chargeable with the Payment of ſuch Tithes, or that be diſcharged by any Compoſition Real. And,

That the aforeſaid Clauſe, (in Reſtraint of Prohibitions) *ſhall not extend to give any Judge Eccleſiaſtical, any Juriſdiction to hold Plea of any Matter, Cauſe, or Thing repugnant to, or againſt the Effect, Intent, or Meaning of the Statute of* Weſtminſter *the* 2d, Chap. 5. *or the Statutes of* Articuli Cleri, Circumſpecte agatis, Sylvæ cæduæ, *the Treatiſe* De Regia Prohibitione, *or the Statute* 1 Ed. 3. c. 10. *or any of them; or to hold Plea in any Matter wherein the King's Court ought to have Juriſdiction, any thing therein contained to the contrary notwithſtanding.*

And another Clauſe is added againſt *Tithes of Marriage Goods in* Wales, *&c.* which ſee before in Chap. 4. and divers other Clauſes of this Statute in the ſeveral Parts of this Treatiſe.

Now, as the three laſt recited Statutes of 27 *H.* 8. 32 *H.* 8. and 1 *&* 2 *Ed.* 6. are the grand Hinges upon which the Gates of Eccleſiaſtical Juriſdiction in Caſes of Tithes do turn and move (for I take the late Statutes of 7 *&* 8 *W.* 3. and 1 *Geo.* 1. (of which hereafter) very much to derogate from what they call Spiritual Power) ſo we may obſerve a kind of *Climax* in the Order and Degrees of Puniſhment inflicted by each of thoſe Statutes.

1. By the 27 *H.* 8. Proceſs for Contempt of their Authority is given before Sentence, but no Proviſion for Contempts after Sentence.
2. By 32 *H.* 8. Proceſs for Contempt is given after a Definitive Sentence; but obſerve the different manner of Penning, *&c.*
3. By this laſt of *Ed.* 6. a Writ of *Excommunicato capiendo* is given, if the Party continues obſtinate forty Days after the Excommunication publiſhed.

Thus the Zeal of our Proteſtant Clergy to Damn thoſe, who with-held the Church's Rights, became remarkably Eminent, *&c.* And a Man would think here were as good Methods provided for Recovery of Tithes in the Eccleſiaſtical Court, as poſſibly could be contrived: But alas, all this could not ſecure thoſe Courts againſt frequent Interruptions by Prohibitions, *&c.* and therefore the Legiſlature thought fit by the Statute of 7 *&* 8 *W.* 3. and 1 *Geo.* 1. *to transfer a Share of their Spiritual Power, in Caſes of Tithes, to his Majeſties Juſtices of the Peace, as true Promoters of the Church's Quiet.*

Stat. 7 *&* 8 W. 3. *and* 1 Geo. 1. c. 6. vide poſt.

CHAP.

CHAP. IX.

Of Remedies and Suits for Tithes in the Temporal Courts; and by what Means the Exorbitancies of the Eccleſiaſtical Courts were formerly reſtrained; with a particular Diſcourſe of Prohibitions and Conſultations, and the Incidents and Conſequents thereof, as Libels, Suggeſtions, Proofs, Verdicts and Judgments; wherein Mr. W——'s Objections againſt granting Prohibitions are conſidered, and the Caſes and Authorities for or againſt the Practice of the Common Law therein truly ſtated.

Eccleſiaſtical Juriſdiction.

IN the foregoing Chapter, we have ſhewn the Original and Progreſs of Eccleſiaſtical Juriſdiction, and how far that Juriſdiction in Caſes of Tithes hath been confirmed, enlarged or regulated by ſeveral Acts of ſucceſſive Parliaments, 'till we came to that of 2 & 3 *Ed.* 6. *c.* 13. before-mentioned.

Exorbitant, but reſtrained by the Temporal Courts,

We have alſo in Part (and only in Part) ſhewn the Practices of the Clergy and their Courts, in extending their Juriſdiction (eſpecially in Caſes of Tithes) beyond its due Limits, and the Neceſſity the Temporal Courts lay under to reſtrain their Exorbitances and Encroachments, and that this was done chiefly by Writs of *Indicavit*, and Right of Tithes at Common Law.

five Ways at Common Law.

Mr. *Selden* in his Hiſtory of Tithes, *pag.* 422, reckons up five ſeveral Methods or Ways, whereby the Eccleſiaſtical Courts might be reſtrained at Common Law, and the Right of Tithes determined in the Temporal Courts, *viz.*

1. *By Prohibitions.*

1. By ordinary Prohibitions, of which we ſhall preſently diſcourſe.

2. By Indicavits, *&c.*

2. By *Indicavits*, and Right of Tithes; of which ſee in the precedent Chapter.

3. By Scire Facias.

3. By *Scire Facias* in Chancery, grounded either upon Letters Patent, Fines or ſome other Matter of Record. Q. Whereof Mr. *Selden* in his Hiſtory, *pag.* 439, *&c.* gives ſeveral Inſtances; ſee alſo 2 *Inſt.* 640. But this Method being reſtrained by Stat. 18 *E.* 3. *c.* 7. I ſhall ſay no more thereof.

4. By Mandamus.

4. By Writs or Proceſs Mandatory, (*i. e.* By *Mandamus*, *&c.*) commanding the Payment of Tithes to certain Perſons in particular; of which Mr. *Selden*, in his ſaid Hiſtory, *pag.* 444, *&c.* gives us ſome few Inſtances; but theſe, having never been frequent, and now for a long Time altogether diſcontinued, I ſhall no farther meddle with.

5. *By Action of Debt, Treſpaſs, &c.*

5. By Action of Debt, Treſpaſs, Caſe, *&c.* for Tithes, as a Temporal or Lay Duty;

Duty; and this ſeems to have been a Remedy originally intended by the Common Law, for not ſetting out Tithes, or taking them away, &c. though, by Reaſon of the controuling Power of the Eccleſiaſtical Courts, ſeldom put in Practice in former Times.

The Common Law reviv'd by Statutes

And though the before recited Statutes of 27 *H.* 8. 32 *H.* 8. and 2 & 3 *Ed.* 6. have by Implication given the like Remedy for not paying Tithes, &c. by Action in the Temporal Courts, and thereby intended to revive the Common Law in that particular; yet it was long afterwards that that Remedy was revived, and put in Practice by the Temporal Courts.

of 27 H. 8.

As to the Stat. 27 *H.* 8. ſee it recited before, and note the particular Clauſe thereof, *infra.*

32 H. 8. *and* 2 & 3 Ed. 6.

And by the Stat. 32 *H.* 8. it is Enacted, *That in all Caſes where any Perſon then had, or then after ſhould have any Eſtate of Inheritance, Freehold,* &c. *in or to any Parſonage, Vicarage, Portion, Penſion, Tithes, Oblations,* &c. *which then were or then after ſhould be made Temporal, or admitted to be, abide and go to or in Temporal Hands, and Lay Uſes,* &c. *ſhould then after be diſſeized, deforced, wronged, or otherwiſe kept or put from their lawful Inheritance, Eſtate, Seizin, Poſſeſſion, Occupation, Term, Right or Intereſt of, in or to the ſame, by any Perſon claiming or pretendidg to have Intereſt or Title to the ſame, That then, and in every ſuch Caſe,* &c. *the Perſon ſo diſſeized,* &c. *and their Heirs, Wives,* &c. *ſhall and may have their Remedy in the King's Temporal Courts, or other Temporal Courts, as the*

Caſe ſhall require, for the recovering, &c. *thereof, by Writs original of* Quod ei deforceat, Præcipe quod reddat, *Aſſize*, &c. *as the Caſe ſhall require.*

Right of Tithes a Lay Fee, and Tithes themſelves Lay Chattles.

So that, ſince this Statute, the Caſe is put out of all Doubt, That for ſuch Tithes (the Right thereof being thereby declared a *Lay Fee*, and themſelves *Lay Chattles*) the ſame is now determinable at the Common Law; and that not only all Manner of Real Actions therein mentioned, but alſo all Mixt and Perſonal Actions, as the Caſe requires, (*viz.* Ejectment, Treſpaſs, Debt, Caſe, &c.) may be had and brought thereupon. And this, in common Practice, is now done daily.

Stat. 2 & 3 Ed. 6. c. 13.

And as to the Stat. 2 & 3 *Ed.* 6. *c.* 13. Although it is ſaid by Sir *S. Degg* to be the firſt Law that ever gave the Temporal Courts Juriſdiction for the Parſon againſt his Pariſhioners, for Subſtraction of Tithes; yet I conceive, whoever will carefully attend to the Words of the Stat. 32 *H.* 8. in the Clauſe above-mentioned, can hardly be of the ſame Opinion; for ſurely a *Subſtraction of Tithes* is a *Wrong* done to him who has a Right thereto, and conſequently falls directly within the Words of the ſaid Clauſe *ſupra*. For which Wrong, at leaſt an Action of the Caſe lay by the ſaid Statutes, as in other like Caſes it did by the Common Law.

Subſtraction of Tithes, a Wrong, and actionable in Caſe, &c.

Alſo note; after the ſaid Stat. 2 & 3 *Ed.* 6. has confirmed the ſaid former Statutes of 27 *H.* 8. and 32 *H.* 8. it Enacts, *That every of the King's Subjects ſhall from thenceforth truly*

truly and juſtly, without Fraud or Guile, ſet out, yield and pay all Manner of their Predial Tithes, &c. *in ſuch Manner and Form, as hath been of Right yielded and paid within forty Years next before,* &c. *or of Right or Cuſtom ought,* &c. *and that no Perſon ſhall take or carry away ſuch or like Tithes, which had been yielded or paid within the ſaid forty Years, or of Right ought,* &c. *in the Place or Places Tithable of the ſame, before he hath juſtly divided or ſet forth for the Tithes thereof the Tenth Part of the ſame, or otherwiſe agreed with the Parſon for the ſame Tithes,* &c. *under the Pain of the Forfeiture of treble the Value of the Tithes ſo taken and carried away.*

So Debt lies for the treble Value.

Now this Clauſe being compared with the like in the former Statute, penned almoſt in the ſame Words for the *Double Value*, and no Action having been brought thereon, might well occaſion ſome Men to doubt what the Meaning of the Parliament was, and whether they intended an Action ſhould lie in the Courts of Common Law for the ſaid treble Value.

And it muſt be confeſſed that it was at leaſt forty Years after the making of this latter Statute, *i. e.* 29 *Eliz.* (when almoſt all that were preſent when made, were dead) before the Blindneſs of even thoſe Times diſcovered, That an Action of Debt lay upon this Clauſe for treble Damages in the Courts at Common Law, though now it is generally admitted, and I ſee no Reaſon why it will not lie there, for double Damages on the former Statute alſo. But ſee 2 *Inſt.* 650. & *infra.*

The

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The

Information in the Exchequer for the treble Value.

The firſt Caſe where an Action, &c. was brought in the Temporal Courts for the treble Value, was that of the Queen and *Wood*, *Paſch.* 29 *Eliz. in Scaccario:* Where in an Information by the Attorney General, againſt the Defendant, for not ſetting out Tithes, &c. it was Reſolved by the Court, That an Action of Debt lay at the Common Law, for not ſetting forth of Tithes. (*Note the Reaſon.*) For whereſoever an Act of Parliament gives a Forfeiture againſt him that doth diſpoſſeſs, &c. the Owner of his Property, as here he doth of his Tithes, there the Forfeiture is given to the Party grieved or diſpoſſeſſed; and (I add) may be ſued for at the Common Law.

Actions of Debt, &c. in other Common Law Courts.

Since which Reſolution, Actions of Debt have been frequently brought in all the Courts at *Weſtminſter*, by Parſons, Vicars, Proprietors, Owners and Farmers of Tithes, Laymen and Eccleſiaſticks, upon this Statute. See *Dier* 171. *Yelv.* 126. *Stile* 122. 1 *Brownl.* 86, 98, 100. *Noy* 63. 2 *Cro.* 68. 3 *Cro.* 621. *Moor* 911. 1 *Roll. R.* 13. 1 *Ventr.* 126. *Cumberba.* 283. 2 *Salk. cum multis aliis.*

How Statutes 27 H. 8. *and* 2 & 3 Ed. 6. *reſtrain the Eccleſiaſtical Courts.*

And note; by a particular Clauſe in the Stat. 27 *H.* 8. *c.* 20. it is provided, *That every Perſon who is Party to any Suit (in the Eccleſiaſtical Court) ſhall and may make and have his lawful Action, Demand or Proſecution, Appeals, Prohibitions, and all other their lawful Defences and Remedies in every ſuch Suit, according to the ſaid Eccleſiaſtical Laws, and the Laws and Statutes of this Realm, in as ample and liberal Manner and Form as they might*

might have had, if this Act had never been made, &c.

And by the Stat. 2 & 3 *Ed.* 6. which confirms the former, it is Enacted, &c. *That this Act, nor any Thing therein contained, ſhall not extend to give any Miniſter or Judge Eccleſiaſtical, any Juriſdiction to hold Plea of any Matter, Cauſe or Thing, being contrary or repugnant to or againſt the Effect, Intent or Meaning of the Stat.* Weſtminſter 2. c. 5. *the Statutes* Articuli Cleri, Circumſpecte Agatis, Sylvæ cæduæ, &c. Vide ante; *ne yet hold Plea in any Matter whereof the King's Courts of Right ought to have Juriſdiction*, &c. *See the Act* ante.

Which ſaid Clauſes, with others, have given Ground to many Prohibitions. *Prohibitions grounded thereon.*

And note; Prohibitions are generally granted upon the Grounds, and in the Caſes following, *viz.* *General Rules of Prohibitions.*

Firſt, upon a *Modus Decimandi*, where the Defendant in the Spiritual Court ſuggeſts, That he and all thoſe whoſe Eſtate he hath in the Lands, &c. in which, &c. have Time out of Mind paid ſo much yearly in Money, or given ſome other Recompence in Satisfaction of all the Tithe Hay or Corn, &c. This Manner of Tithing being by Preſcription, which is properly and only triable at Common Law, (whether pleaded in the Spiritual Court, or not pleaded; or whether allowed, or not allowed, there as a good Plea) it is a good Ground of a Prohibition. Modus *by Preſcription.*

What Preſcriptions and *Modus Decimandi* are good, or not, in ſuch Caſes, *vide*

vide ante; and ſee *Hob.* 42, 247, 286. 2 *Inſt.* 6. 10. 2 *Co.* 44. *Dyer* 74. *p.* 49. *& ſupra & infra.*

Bounds of Pariſhes. *Secondly*, If the Bounds of a Pariſh come in Diſpute; as whether the Place where the Tithes do ariſe, be within this or that Pariſh; this is a Matter triable by Jury, and therefore upon a Suggeſtion thereof, a Prohibition will be granted. See *Noy* 147. 7 *Co.* 44. *b.* 2 *Roll. Abr.* 291. *L.* 1, *&c. Cro. El.* 223. 5 *H.* 5. 10.

Lands diſcharged by Stat. &c. *Thirdly*, If Lands be ſuggeſted to be diſcharged of Tithes, by the Stat. 31 *H.* 8. or any other Statute, a Prohibition lies, *becauſe it properly belongs to the Judges of the Common Law to expound all Statutes*, &c. and ſo if the Suggeſtion be grounded upon the Stat. 2 *Ed.* 6. for Barren Grounds. See 2 *Roll. Abr.* 307. V. 13. 4 *Co.* 53. *Porter* verſ. *Rocheſter*, & ante.

Suits for Things not Tithable. *Fourthly*, If one ſue in the Spiritual Courts for the Tithes of Things not Tithable by the Common Law, or for the Tithes of great Woods above twenty Years Growth, *&c.* it is a Ground for a Prohibition. *Vide ant.* Chap. 1, 3, 4, *&c.*

Matter determinable at Common Law. *Fifthly*, If a Suit be in the Spiritual Court for the taking and carrying away of Tithes, after they are ſet forth, and divided from the nine Parts, by the Pariſhioner, (unleſs the Suit be between two Eccleſiaſtical Perſons in their own Rights) a Prohibition lies, becauſe it is Matter triable at Common Law. 38 *E.* 3. 5. 2 *Roll. Abr.* 286. N°. 4.

Sixthly,

Sixthly, If the Spiritual Court will not admit a legal Defence, as a Releaſe, an Accord with Satisfaction, or an Award, *&c.* or if the Spiritual Judge refuſe to admit the Defendant to traverſe the Plaintiff's Title, as that he is not Parſon, Vicar, *&c.* a Prohibition will be granted. But if the Defendant in the Spiritual Court, alledge ſuch Matter againſt the Plaintiff there, which is properly triable in that Court, as Simony, Inceſt, *&c.* in ſuch Caſe no Prohibition will be granted. *Quære & vide Cro. El.* 228, 640. 2 *Roll. Abr.* 302. *Quære* 19, 23, 24, V. 16. *Irregular Proceedings of the Spiritual Court, in not admitting a Plea, or refuſing legal Proof, &c.*

Seventhly, If the Spiritual Court ſhall diſallow the Proof of the ſetting forth of the Tithes by one Witneſs, a Prohibition will be granted. See *Cro. El.* 666. 2 *Roll. Abr.* 300. *Quære* 6, 8, 9. and 301, 14, 15, *Moor* 909. *Hetl.* 87. *Sed* 12 *Co.* 65. *contr.* And ſo, if they deny a Copy of the Libel, *&c.* See 2 *Salk.* 553. and 6 *Mod.* 156.

There are many more Caſes wherein Prohibitions have been granted, (*vide infra*) and indeed in all Caſes where thoſe Courts exceed their Juriſdiction, Prohibitions ſeem abſolutely neceſſary, to reduce them within their proper Bounds. *Exceeding their Juriſdiction.*

In the 16 *Jacobi* 1. A *Modus* being ſued for in the Eccleſiaſtical Court, a Prohibition was granted, becauſe the Defendant there denied the *Modus*, and the Court there ſaid that the *Modus Decimandi* muſt be ſued for in the Eccleſiaſtical Court, as well as the very Tithe. 2 *R.* 3. 3. *a.* And if it be allowed between the Parties, they ſhall proceed there; *Prohibitions where the* Modus *is denied, &c.*

there; but if the Cuſtom be denied, it muſt be tried at the Common Law; and if it be found for the Cuſtom, then a Conſultation muſt go; but otherwiſe the Prohibition ſtandeth. *Hob.* 245.

And the like was reſolved by the Court of *C. B.* upon a Suit for a *Modus* of Tithes by the Shock, and not by the Sheaf, in *Steward*'s Caſe. *Hill.* 4 *Car.* 1. See *Noy* 81. and *Hetl.* 133.

For Tithe of Fiſh, as due only by Cuſtom.

In 3 *Car.* 1. when one libelled in the Eccleſiaſtical Court for Tithe of Fiſh (which is due merely by Cuſtom, and not of Common Right) and the Defendant pleaded, That Time out of Mind they had paid no Tithe of Fiſh. And a Prohibition being prayed, *Richardſon* replied, That it is merely an accuſtomary Tithe, as Rabbits, *&c.* whereof no Tithes are due by the Law of the Land, *&c.* See 1 *Keb.* 602. And the other Juſtices ſaid, That a Prohibition ſhall be granted, becauſe the Cuſtom ought to be tried by the Common Law.

Difference in Moduſſes.

And in that Caſe a Difference was made between a *Modus Decimandi*, (which is alſo cuſtomary) where the Cuſtom only makes the Duty, and where there is a Tithe precedent Due, and that *Modus* converts it into another Duty, there no Prohibition ſhall be granted, but it ſhall be tried in the Eccleſiaſtical Court, whether there be ſuch a *Modus Decimandi*, or not; which Difference was agreed by *Twiſden*, Juſt. *&c.* 3 *Keeb.* 452.

Where, after a Cuſtom is tried, the Spiritual Court may proceed.

But if a Parſon libel for a *Modus* to pay 3 *d.* and it is alledged, That the *Modus* is but for 2 *d.* although this is to be tried by the Common

Common Law, ſo as to aſcertain what the *Modus* is, yet after the Cuſtom is ſo tried, they in the Spiritual Court may proceed upon it. *Hetl.* 13.

And ſo about 3 *Car.* 1. When a *Modus* to have 2*s.* in the Pound for every Houſe and Shop in the Town, was ſued for in the Spiritual Court, and a Prohibition being prayed, the Court declared, That a Parſon may well ſue for a *Modus Decimandi* in the Eccleſiaſtical Court; but (*per Jones* and the Ch. Juſt.) if it be denied, they cannot proceed, becauſe they cannot try the Matter of the Preſcription there; and if they proceed, a Prohibition lies.

If the Modus *be denied, the Spiritual Court cannot proceed.*

But in that Caſe no Prohibition was granted, becauſe the Defendant had anſwer'd, as to the Cuſtom, only thus: *Quod non credit eſſe veram.* Which (as *Doddcridge* ſaid) was no Denial of the Preſcription, for that ought to be done by Way of direct Allegation: And *Noy* ſaid, That their Form of anſwering to Articles is (*ut ſupra*) with a *Non-Credit*, *&c.* but if the Defendant there will deny the Preſcription, he ought to come here by Way of Allegation, and *Jones* accorded. See *Latch.* 210.

Denial to be by direct Allegation.

So when the Parſon of *B.* in *London* libelled in the Spiritual Court upon a Cuſtom, That if a Pariſhioner of *B.* dies in *B.* and is carried and buried in another Pariſh in *London*, there ought to be given to the Parſon thereof, a Gown, a Pulpit-Cloth and a Pair of Gloves: It was held, That a Prohibition lies to try this Cuſtom, if it be denied, becauſe their Rules of Preſcription are variant

Why they cannot try Cuſtoms, &c.

riant from ours; and a Cuſtom may be made in a ſhorter Time, according to the Canon Law, than is allowed by the Common Law. 2 *Roll. Abr.* 307.

May try a Preſcriptive Right to a Seat.

And yet in the Caſe of *Jacob* and *Dallow*, *Paſ.* 1 *Annæ* in *B. R.* It was held by *Holt*, Ch. Juſt. That where a Man has a preſcriptive Right to a Seat in a Church, if he is diſturbed therein, he may well ſue in the Spiritual Court to have his Poſſeſſion quieted. See 2 *Salk.* 551. 5 *Mod.* 436. and 6 *Mod.* 230. and note *Hetl.* 94. *Noy* 78. and 2 *Jon.* 3. are there cited.

But not a Modus Decimandi.

But by the foregoing Caſes it appears, That generally a Parſon can only begin a Suit in the Eccleſiaſtical Court for a *Modus*, but cannot purſue it, or recover any Thing there, unleſs his Adverſary will conſent to it; for that a Cuſtom *de modo Decimandi* is not of Eccleſiaſtical Juriſdiction or Cognizance, that is, tho' a *Modus* may be ſued for or demanded in that Court, yet they cannot try it there.

For whenever the Defendant there, ſhall, by Way of Allegation, either deny the *Modus* ſued for, or ſuggeſt another *Modus*, the Eccleſiaſtical Judge is bound to ceaſe his Proceedings.

But we may here obſerve, That the firſt of the Caſes *ſupra*, wherein the Power to try ſuch a *Modus* is denied to the Spiritual Courts, was in *Michaelmas* Term, 14 *Jac.* 1. when *Coke* was Chief Juſtice; but he being ſoon after remov'd by the King, (who much favoured the Eccleſiaſtical Juriſdiction) and *Montague* placed in his Room, the contrary

was

was reſolved in on *Newberry*'s Caſe. See 1 *Roll. R.* 420. and this was about ſeven Years after the famed Debate before the King and Council betwixt the Spiritual and Temporal Judges, which is mentioned by my Lord *Coke* and others.

Quære. *The Debate touching Eccleſiaſtical Juriſdiction.*

And note; one Point in that Debate was, Whether, when a Suit is begun in the Spiritual Court for Tithes in Kind, and a *Modus Decimandi* is thereon ſuggeſted, by which the Lands are diſcharg'd, a Prohibition lies to try the ſame at Common Law; and hereupon Mr. *W.* ſomewhat warmly, but irrationably, and untruly urges many Things on the Behalf of the Eccleſiaſtical Juriſdiction on that Head, *viz.*

It ſeems (ſays he) the Civilians had never known, nor heard of Prohibitions, when a Suit was begun there for a *Modus*; for otherwiſe they would not have ſaid as they did, That the Cuſtom *de modo Decimandi* is of Eccleſiaſtical Juriſdiction and Conizance, and was to be tried before the Eccleſiaſtical Judges, and argued from thence as from an unqueſtioned Ground or Principle. And the Temporal Judges, if they had held and adjudged the contrary before, would not have anſwer'd by Way of Conceſſion, as (ſays he) *Coke* reports they did, *viz.* That a Parſon, by Force of the Acts cited *ſupra*, might well ſue (*Quære* in what Court) *pro modo Decimandi*, and compel the Defendant to yield as well the *Modus Decimandi*, as if the Suit were for Tithes in Kind (in the Spiritual Court) and they only denied the Conſequence the Civilians would draw from thence,

See W. *p.* 616, 617, &c.

A notoricus petitio principii, being the very Point in Queſtion.

A groſs Miſrepreſentation.

thence, ſaying, * That this did not prove, That if a Suit be for Tithes in Kind, which are extinct, and the Land diſcharged, that upon a Suggeſtion *de modo Decimandi*, a Prohibition did not lie: But rather they would have replied, (as the late Caſes are, and ſome ancient ones too) *That a Cuſtom* de modo Decimandi *is not of Eccleſiaſtical Conizance*; and that, *if they tried a* Modus *when it was there denied, a Prohibition would lie.* And what, (ſays he) the Judges did declare upon ſo ſolemn Occaſion, is much to be † depended upon in judging what the Law then was; eſpecially when ſome of the Judges, who being eminent for their Learning in the Law, and Knowledge of the Practice of their Courts, if Prohibitions had been uſually granted, and ought to be, could not but know thereof, and have gainſaid what was ſaid againſt the Intereſt of their Courts, and againſt the Opinion of others that did grant them, as *Dodderidge* and *Croke* in *Hardin* and *Goſling*'s Caſe. 3 *Bulſt.* 241. and *Richardſon* in *Hetley* 13.

Nor, (ſays he) may it be ſaid, That theſe Judges did by their Conceſſions only intend, That a Parſon by Force of the ſaid ‡ Acts might ſue *pro modo Decimandi*, but not

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* *The Judges prudently avoided coming to the Point, knowing they were not before a proper or impartial Judge.*

† *An erroneous Concluſion, for Extrajudicial Opinions are not to be depended on. They knew the Rule* Ne Reſponde Inſanienti, &c.

‡ N. B. *Thoſe Statutes were chiefly made for the Benefit of Lay Patrons, and in ſuch Caſes gave Juriſdiction to both Courts; but the Superior,* i. e. *the King's Courts, had the Appeal by Prohibition,* &c.

that the Judge ſhould proceed in the Suit, in Caſe the *Modus* ſhould be denied. For Firſt, It is granted by them, That the Statutes before cited in the ſeveral Clauſes, declaring, That all Manner of Tithes, and other Church Duties, ſhall be ſued for in the Eccleſiaſtical Courts do * extend as well to a *Modus Decimandi*, as to Tithes in Kind; and the Statute of 27 *H.* 8. ſaith, *That Tithes ſhall be paid according to the laudable Uſages and Cuſtoms of the Pariſh*; and *That for ſubſtracting any of the ſaid Tithes, Offerings, or other Duties, the Parſon may not only convent the Offender before the Ordinary, but alſo compel him to yield the ſaid Duties*, (that is, as the ſaid Judges expounded the ſaid Words) as well a *Modus Decimandi*, as Tithes in Kind. And with that, in Effect, agrees the Statute 32 *H.* 8. *c.* 7. So that what is enacted thereby † extends alſo, in their Judgments, to a *Modus Decimandi*, as well as to Tithes in Kind; and it is plain it does ſo: For the Words thereof are, *That all and ſingular the Tithes ſhall be paid according to the lawful Cuſtoms and Uſages of the Pariſhes and Places where ſuch Tithes or Duties ſhall grow, ariſe, come, or be due, and that the Party grieved may convent the Perſon offending before the Ordinary: And alſo* (which comes cloſe to the Doubt) *that in every ſuch Caſe*

* *But not to exclude the King's Courts, there being no negative Words; and Prohibitions (where the Suit in the Spiritual Court may be objected to) are Writs of Right.* Quære *thoſe Statutes* ante.)

† *This varies from the Purpoſe, nor are the Clauſes fairly recited.*

or Matter, or Suit, the ſame Ordinary, &c. * (as the Words are) *ſhall or may, by Virtue of this Act, proceed to the Examination, Hearing, and Determination of every ſuch Cauſe, or Matter, ordinarily or ſummarily, according to the Courſe and Proceſs of the ſaid Eccleſiaſtical Laws, and thereupon may give Sentence accordingly*: And by the Statute 2 & 3 *Ed.* 6. It is ſaid, as to all Manner of Predial Tithes, *That they ſhall be paid in ſuch Manner,* &c. *as of Cuſtom and of Right they ought to be paid,* &c. which he goes on to pervert, &c. in like Manner; and then adds,

Cuſtoms, &c. *tried in the Spiritual Courts.*

When a Parſon libelled in the Spiritual Court for a Way, and it was ſuggeſted, That the Libel ſet forth, That by the Cuſtom of the County of *Devon*, when Graſs is cut, and put into Graſs Cocks, the tenth Cock ought to be aſſigned to the Parſon for his Tithes, and that he might, by the Cuſtom, make it into Hay upon the Land of the Party, and that he was hindred by the Defendant the Owner of the Land, of his Way to come to make it into Hay; the Court adjudged, that no Prohibition did lie; for that it was only an Acceſſary to the Thing that is Spiritual; and *Fitz. Natr. Brev.* is, That the Parſon may have his Action on the Caſe for ſuch Diſturbance. (Note, this proves it to be of Temporal Conuzance.)

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* *Note this,* &c. *and the Craft of the Parentheſis inſtead of,* or other Judge, &c. *Nor is any Notice taken of the Proviſion in this Statute for the Juriſdiction of the King's Courts. See the Statute* ante, Chap. 8.

But

But in that Caſe it was alledged further for a Prohibition, That the Cuſtom of the County is, That the Parſon ſhall not make his Tithe-Hay upon the Land, but carry it away preſently; and by this Libel in the Spiritual Court, they would alter the Cuſtom, which is to be tried at the Common Law: But notwithſtanding this, (ſays Mr. *W.*) the Court would not grant a Prohibition. *Reynolds* v. *Newberry*, 1 *Roll. R.* 420.

An unreaſonable Counter-Cuſtom no Ground for a Prohibition.

And no Wonder the Prohibition was denied in that Caſe; for the Counter-Cuſtom, which was alledged for the Prohibition, appears to be contrary to common Right, and could not be ſupported without a Conſideration in Lieu thereof, which does not appear.

And yet that Author urges this Caſe to prove, that when the Eccleſiaſtical Court hath Juriſdiction of the Principal, the Acceſſory, though it be a Preſcription, may be there ſued for, and if denied, tried there; not conſidering, That the Cuſtom claimed in the Libel, was founded on Common Right, and that the Cuſtom urged for the Prohibition was contrary to common Right, and no Conſideration ſhewn to ſupport it. See 3 *Cro.* 843.

Mr. W. *Miſtaken.*

And of the ſame Nature is what he further urges, *viz.* That if a Queſtion be, which of two Ways is the uſual and accuſtomed Way for carrying away the Tithes, it ſhall be tried in the Spiritual Court, as appears by *Halſey*'s Caſe in *Jones R.* 230. for there it appeared by the Party's own ſhewing, that he would have precluded the Parſon

from the Right Way, and that without any Conſideration. So that Mr. *W.*'s Concluſion is a plain *non ſequitur*. For he ſays thoſe Caſes prove, That a Preſcription, upon which a Libel may be grounded in the Spiritual Court, may be alſo tried there; as whether the Defendant had ſtopt the Right Way, or which of the two Ways is the moſt uſual, *&c.* For it appears in thoſe Caſes, the Temporal Courts had before determin'd the Queſtion on the Party's own ſhewing, as aforeſaid. But he goes on for three Pages further thus:

W. *pag.* 618.

Circumſpecte agatis.

Beſides, in the Statute of *Circumſpecte agatis* 13 *E.* 1. it is determined, That ſeveral Things are merely Spiritual, and are to be demanded in the Spiritual Court; and the Spiritual Judge ſhall have Power to take Knowledge thereof, notwithſtanding the King's Prohibition, one Article of which Statute is, *If a Parſon demand Mortuaries in a Place where a Mortuary hath been uſed to be given*, &c. By Force of this Article, and before the Stat. of 21 *H.* 8. *c.* 6. If Doubt did ariſe whether there was a Cuſtom in a Place to have ſuch or ſuch Things for a Mortuary, this Cuſtom, ſays he, was triable in the Spiritual Court, and cites *F. N. B.* 51. *and* 53. 10 *H.* 4. 2. 13 R. 1, 2. *F. Juriſd.* 20. and *Kelw.* 110. *b.* 1 *Cro.* 237. 1 *Sid.* 263. 1 *Keb.* 919. 2 *Keb.* 835, 867. and 3 *Keb.* 75.

Cuſtoms of Mortuaries.

Penſions to Prelates, &c.

Another Article is, That *if a Prelate of a Church, or Patron, demands a Penſion due to him, all ſuch Demands are to be made in the Spiritual Court*, and accordingly it has been held, That tho' the Libel ſhews that *tam per regalem*

realem Compoſitionem, quam per antiquam & laudabilem Conſuetudinem ipſe & Predeceſſores ſui habuerunt & habere conſueverunt annualem Penſionem, &c. and ſo, as had been urged, the Penſion was demanded upon Temporal Grounds, *viz.* Preſcription and Real Compoſition; yet *Coke* and the reſt of the Juſtices held, That a Prohibition ought not to be granted. See *Godbolt* in the Caſe of *Sprat* and *Nicholſon* and *Collier's* Caſe, 3 *Cro.* 675. 11 *H.* 4. 85. *F. N. B.* 41. *Popham* 23. *Noy* 16. and 2 *Cro.* 217. and accordingly a Prohibition was denied; for that a Penſion is a Spiritual Thing, recoverable in the Spiritual Court; and yet, ſays he, a Title to a Penſion, if ſuable at all in the Spiritual Court, muſt depend upon Preſcription; and if denied, the Preſcription muſt be tried there before the Penſion can be recovered: But he admits, That upon a Motion for a Prohibition to the Spiritual Court in a Suit there for a Penſion, it was held by the Court, That the Law is according to *F. N. B.* 51, *B.* (*Q.* 41.) That if the Penſion be by Preſcription, it is in the Election of the Party to ſue for it in the Spiritual Court, as for a Penſion, or at Common Law, as for an Annuity. And it was further ſaid, That the Opinion of the Lord *Coke*, 2 *Inſt.* 491, 492. is not warranted by the Books by him there cited. But *Windham* and *Twiſden*, Juſtices, ſaid, That in the Time of King *James* it was adjudged, That for a Penſion by Preſcription, Remedy ſhall be only at the Common Law: And therefore the Reporter makes a *Quære* of it, 1 *Sid.* 146. But afterwards

Election to ſue in the Spiritual or Temporal Courts.

Various Opinions and Reſolutions therein.

wards it was reſolved by *Keeling* and *Twiſden* Juſtices, That Penſions by Preſcription, may be ſued for in the Spiritual or Temporal Court, at the Election of the Party; and although in the Caſe then before them, the Preſcription was denied; yet they would not grant a Prohibition. See 2 *Keb.* 439. 802. and *Vent.* 3. and yet after all this, it was held, That although a Suit may be in the Spiritual Court for a Penſion, by Preſcription; yet if it be denied to be Time out of Mind, *&c.* a Prohibition ſhall go, for that the Preſcription ſhall be tried by the Temporal Courts. See 1 *Vent.* 265. and *ib.* 120. 3 *Keb.* 522. (*& ante*, Chap. 8.) And ſeeing (ſays he) That by the ſaid Statute *Circumſp. agatis*, Preſcriptions for Payment of Mortuaries and Penſions are triable and determinable in the Spiritual Courts, and this hath been owned and allowed by ſeveral Judgments in the Temporal Courts, and Opinions of the Judges; it will be difficult to apprehend the Reaſon why a *Modus Decimandi* may not be tried alſo in the Spiritual Court, eſpecially there being this Article alſo in the ſaid Statute of *Circumſp. agatis*: *That if a Parſon demand of his Pariſhioners, Oblations, or Tithes due and accuſtomed, the Spiritual Judge ſhall have Power to take Knowledge or Conuzance, notwithſtanding the King's Prohibition*; and as agreeing herewith, he cites 13 *Coke*, the Caſe of *Modus Decimandi*, 2 *Keb.* 439. and 802. and 1 *Ventr.* 3. yet he afterwards confeſſes, that later Opinions of the King's Courts have been to the contrary; and that wherever the

Note; *one Difficulty ariſes* ab impoſſibili, i. e. *They cannot try by Jury, who only can determine a Cuſtom.*

the Cuſtom has been denied, a Prohibition has gone. See 1 *Ventr.* 120, 265, 174, 2 *Keb.* 41. 3 *Keb.* 523, 527, 562.

But after this he goes on to obſerve, That in the ſame Article concerning Tithes in the ſaid Statute, it is ordained, *That if any Parſon ſues againſt another Parſon for Tithes, greater or ſmaller, ſo that the fourth Part of the Value of the Benefice be not demanded, the Spiritual Judge ſhall have Power to take Knowledge or Conuzance, notwithſtanding the King's Prohibition*; and herewith (ſays he) agrees 38 *Ed.* 3. 6. where it is ſaid, if the Right of Tithes come in Debate between two Spiritual Perſons, *&c.* as before *p.*--- the Eccleſiaſtical Court ſhall have Juriſdiction, and to that End alſo quotes 13 *Co.* 39. 2 *Roll. Abr.* 308. N° 2. and *Richardſon's* ſaying, That the Books make a Doubt where the Suit is between the Servant of the Vicar and the Parſon; but that it ſeemed to to him to be all one. *Hetley* 60.

Between two Parſons.

Between the Vicar and the Parſon.

So (ſays he) when a Vicar ſu'd for Tithes againſt a Parſon appropriate (who was a Layman) in the Eccleſiaſtical Court for Tithes of Saffron, and alledged, That Time out of Mind the Vicars have had Tithes of Saffron within that Pariſh; and the Parſon pleaded, That he, and his Predeceſſors, had uſed to have Tithes of Hay and Corn of this Land till within forty Years laſt paſt, when it was ſowed with Saffron; it was ſaid, That no Prohibition ſhall be granted to try this Cuſtom, but it ſhall be tried in the Spiritual Court; for that it is between the Parſon and the Vicar, although the Farmer was made

Party

Party, for they may well Judge of it, and of the Compoſition: And that this very Point was adjudg'd between *Hunt* and *Buſh* 30 *El.* and that the Party ſhould have a Conſultation. See *Goldsb.* 149. 2 *Roll. Abr.* 310. N° 5.

One Parſon claims a Portion of Tithes in another's Pariſh.

So when the Parſon of *Great Takenham* brought an Action of Treſpaſs againſt the Parſon of *Harmington*, and the Queſtion was, If the Parſon of one Pariſh claim by Preſcription a Portion of Tithes out of the Pariſh of another, whether the Spiritual Court ſhall have Juriſdiction for the Trial of it? The Opinion of the whole Court was, that it ſhould, becauſe the Matter is betwixt two Spiritual Perſons, and concerning the Right of Tithes. See 1 *Leon.* 59. 2 *Roll. Abr.* 310. N° 2. See alſo 35 *H.* 6. 39. and *Bro. Juriſd.* 3. where in Treſpaſs for Taking of Tithes, the Defendant claim'd them as Parſon, and within his Pariſh; and the Plaintiff preſcribed, that he, and his Predeceſſors, Vicars there, have had the Tithes of that Place Time out of Mind, *&c.* And the Opinion of the Court was, that the Debate being between the Vicar and the Parſon, who are Spiritual Perſons, they may well try the Right of Tithes, and ouſt the Temporal Courts of the Juriſdiction thereof. See alſo 6 *Ed.* 4. 3. 22 *E.* 4. 23, 24. and 31 *H.* 6. 11. between a Parſon and the Servant of another Parſon, and 7 *H.* 7. 35. alſo 35 *H.* 6. 39. *b.* between a Parſon and a Parſon's Tenant, in Treſpaſs, where the Layman ſet forth his Title as Tenant, and pleaded to the Juriſdiction of the Court; and by *Gaſcoign*,

Q. theſe Caſes.

Gaſcoign, the Suit ſhall be in the Spiritual Court, becauſe the Right of Tithes ſhall be tried only in the Spiritual Court betwixt Spiritual Perſons, (but in theſe Caſes one Party was a Layman; *ergo Quære*) ſee alſo 2 *Bulſt.* 157. 2 *Roll. Abr.* 310. N° 1, 2, 4, 6. *Godb. Gothan* v. *Cooper*, 3 *Cro.* 136. 71, and 306. 1 *Leon* 94. and 128. *Noy* 147, *&c.*

Why Prohibitions are not granted in Suits between Spiritual Perſons, W. 620.

And in regard, the Words of the ſaid Statute, *Circumſqecte agatis*, as to this Point only are, *If any Parſon doth ſue againſt another Parſon for Tithes greater or ſmaller, ſo that the fourth Part*, &c. ſupra.—and ſo only gives the Spiritual Court Cognizance of the Right of Tithes, and not of Preſcriptions expreſly; and yet by the Judgments relating to this Matter, both ancient and modern, the Spiritual Courts have been allowed to try and finally determine the Right of Tithes between Spiritual Perſons, though they ground their Titles upon Preſcription, (as for the moſt part they muſt) and ſo try the Preſcription. Yet my Lord *Coke* ſays, That the Reaſon why Prohibitions are not granted in Suits between Spiritual Perſons, as between Parſon and Vicar, is becauſe the *Modus* ſuggeſted to be paid, comes not in Queſtion, but only the Right of Tithes, to which of the Spiritual Perſons they do belong; ſee 2 *Bulſtr.* 158. But (ſays *W.*) other Words in the ſame Statute are, *If a Parſon demands of his Pariſhioners, Oblations or Tithes due and accuſtomed*, (*i. e.* due either in Kind or by Cuſtom) *the Spiritual Judge ſhall have Power to take Knowledge*, &c. and ſo ſeem more expreſly to give them Trial of

of a Cuſtom or Preſcription for Tithes, (*viz.* a *Modus Decimandi*) than the former Words do, which give the Trial of the Right of Tithes betwixt Spiritual Men to that Court.

The Law and Practice herein now ſettled, That Prohibitions lie where a Modus *is denied, and the Reaſons thereof.*

Yet notwithſtanding all that is before ſaid, and all the Caſes cited by Mr. *W.* to the contrary, both the Law and Practice is now ſettled in this Point, *viz.* That if a *Modus Decimandi* be ſued for in the Eccleſiaſtical Courts, a Prohibition lies to ſtop the Trial of it there, if the *Modus* be denied. And the Reaſon given is, That this is done not for that the Spiritual Court wants Juriſdiction, but in Regard of the Notion their Law has of a Cuſtom, *&c.* different from what our Law has, (and ſo of Preſcription) and ſeeing every *Modus* is due by Cuſtom, it is the Common Law only that can determine, what Time and Uſage with us, ſhall be ſufficient to create ſuch Cuſtom, which muſt be Time beyond all Memory to the contrary; whereas by their Law, ſometimes ten Years, and ſometimes twenty, thirty or forty, they will adjudge ſufficient to create a Cuſtom. 3 *Keb.* 527.

Alſo Prohibitions in ſuch Caſes are not granted, for that the Spiritual Court hath not a Juriſdiction of the Matter, but in Reſpect to the Trial of the Cuſtom in Queſtion, which is to be by our Law only; and if on the Trial it be found for the *Modus*, the Proceedings ſhall go on in the Spiritual Court; and if found againſt the *Modus*, the Prohibition ſhall ſtand.

But

Cuſtoms, or Preſcriptions De modo Decimandi, not triable in the Spiritual Court.

But though it ſhould be granted, That a Parſon may ſue in the Eccleſiaſtical Court for a *Modus Decimandi* originally, or for Money or other Thing payable by Cuſtom, in Lieu of Tithes, or for Things not in their Nature Tithable; and though it ſhould be admitted, That a *Modus* may be examined and determined there, when the Libel is grounded thereon; (neither of which is true) yet if the Proprietor of the Tithes of a Pariſh ſues in the Spiritual Court for Tithes in Kind of Lands diſcharged thereof, by Preſcription, *&c.* and the Defendant doth alledge the Cuſtom or Preſcription, *De modo Decimandi, &c.* in Bar; in ſuch Caſe, even the *Civilians* admit, That the Cuſtom or Preſcription ſhall not be tried and determined before the Judge Eccleſiaſtical, but a Prohibition lies to try the ſame at the Common Law; for that the Suit was not originally for a *Modus*, but for the Tithes in Kind of Lands, which by *Modus* or Preſcription are diſcharged from the Payment of Tithes.

By 2 & 3 Ed. 6. c. 13.

And in ſuch Caſe, to ſue for Tithes in Kind is prohibited by this expreſs *Proviſo*, in the Stat. 2, 3 Ed. 6. viz. *Provided always*, &c. *That no Perſon ſhall be ſued, or otherwiſe compelled to yield, give or pay any Manner of Tithes for any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Preſcription are not chargeable with the Payment of any ſuch Tithes, or that be diſcharged by any Compoſition Real*, &c. Vide ante.

of a Cuſtom or Preſcription for Tithes, (*viz.* a *Modus Decimandi*) than the former Words do, which give the Trial of the Right of Tithes betwixt Spiritual Men to that Court.

The Law and Practice herein now ſettled, That Prohibitions lie where a Modus *is denied, and the Reaſons thereof.*

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Alſo Prohibitions in ſuch Caſes are not granted, for that the Spiritual Court hath not a Juriſdiction of the Matter, but in Reſpect to the Trial of the Cuſtom in Queſtion, which is to be by our Law only; and if on the Trial it be found for the *Modus*, the Proceedings ſhall go on in the Spiritual Court; and if found againſt the *Modus*, the Prohibition ſhall ſtand.

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Cuſtoms, or Preſcriptions De modo Decimandi, *not triable in the Spiritual Court.*

And in ſuch Caſe, to ſue for Tithes in Kind is prohibited by this expreſs *Proviſo*, in the Stat. 2, 3 Ed. 6. viz. *Provided always*, &c. *That no Perſon ſhall be ſued, or otherwiſe compelled to yield, give or pay any Manner of Tithes for any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Preſcription are not chargeable with the Payment of any ſuch Tithes, or that be diſcharged by any Compoſition Real*, &c. Vide ante.

By 2 & 3 Ed. 6. c. 13.

Where a Court &c. is reſtrained by Statute, a Prohibition lies.

And always when an Act of Parliament reſtrains or Prohibits, or limits any Court, *&c.* be it Temporal or Spiritual, if the Statute be not obeyed (or obſerved) a Prohibition lies. Of this ſeveral Inſtances are given by the Judges in the Caſe *De modo Decimandi*, 13 *Co.* 12 *&* 37. and by *Dodderidge* in *Harding* and *Goſling*'s Caſe, 3 *Bulſ.* 241. and ſo if a Biſhop, or his Farmer (who ſhall alſo have the Privilege, and the like of the King's Farmer) doth ſuggeſt, That a Suit is in the Eccleſiaſtical Court for Tithes in Kind, whereas the Lands are diſcharged by a Preſcription *De non Decimando*, a Prohibition lies by Virtue of the ſaid Prohibitory Clauſe. See 2 *Co.* 44. The Biſhop of *Wincheſter*'s Caſe.

Prohibitions in Caſes of Non Decimando, Modus Decimandi, *and*

Compoſitions Real.

And not only in the ſaid Caſes of a Diſcharge of Tithes, but alſo in Caſes of a Compoſition Real, which in its Nature is but a *Modus Decimandi* by Preſcription, a Prohibition lies by the expreſs Words of the Statutes *ſupra.*

Mr W.*'s Argument.*

But upon this Head Mr. *W.* is again very warm, and ſtrenuouſly argues againſt Prohibitions in Caſes *de modo Decimandi*, (though what he ſays is chiefly taken from Sir *Thomas Ridley*, in his View of the Civil and Eccleſiaſtical Laws, pa. 181, *&c.* and the Argument of *Bacon*, Solicitor General, who (in that extrajudicial Cauſe *de modo Decimandi*, heard before the King and Council, 4 *Jacobi* 1.) argued on behalf of the Biſhops and Clergy, againſt the Judges and the Common Law; and note his entire Argument thereon may be formed thus:

That

That the Eccleſiaſtical Court has the proper Conuſance of Tithes, and their Acceſſories; That a *Modus Decimandi* is dependant on, and acceſſory to Tithes; *Ergo* a *Modus* ought to be tried in the Eccleſiaſtical Court.

That though a Prohibition lies where Lands are diſcharged, &c. ut ſupra, *yet* non ſequitur.

For though (ſays he) it be true, That where the original Suit is for Tithes in Kind of ſuch Lands as are abſolutely diſcharged by Act of Parliament, Preſcription or Compoſition Real, a Prohibition lies by Force of the ſaid prohibitory Clauſe, *ſupra*: Yet it does not from thence follow, That if Tithes in Kind are ſued for of Lands, which are not diſcharged by any of thoſe Means, and the Defendant alledges a *Modus Decimandi*, which relates to the Manner or Circumſtances of paying ſome particular Tithes of ſuch Lands only, that a Prohibition lies to try ſuch a *Modus* at the Common Law. For in the firſt Caſe the Lands themſelves are diſcharged of the Payment of Tithes, (by Stat.) and ſo the original Suit is (expreſly) prohibited by the Clauſe *ſupra*; but in the later Caſe, the Lands are Tithable; and therefore the original Suit for Tithes in Kind (in the Eccleſiaſtical Court) is warranted by the Statutes *cited ante*.

that it lies to try an acceſſory Modus, &c.

Alſo in the former Caſe the Plea of a *Modus Decimandi* cannot be ſaid acceſſory to the Right of Tithes, becauſe the Tithes are extinct, and the *Modus* is the only Thing with which the Land is chargeable; and therefore by the Clauſe *ſupra*, (which is in the Negative) the Principal, *viz.* the Tithes (a *Non-entity*) are not to be ſued for there.

Where the Tithes are extinct, the Modus *cannot be acceſſory.*

And

Ridiculous Reaſoning, to make an Acceſſory to a Non-entity.

And ſo the Rule *That, when the Eccleſiaſtical Court* hath Juriſdiction of the Principal, it ſhall not of the Acceſſory, cannot hold Place. But in the later Caſe, the *Modus* is but an Acceſſory to the Right of Tithes, and the Reaſons given by the Judges in the ſaid Caſe *De modo Decimandi* are not applicable to it; for here the *Tithes in Kind* of the Land are not abſolutely * extinct. For ſuppoſe the Caſe to be, That when Lands are ſown, Tithes of Corn are to be paid in Kind; when they are mowed, of Hay; when depaſtured, of the Stock; and yet for ſome of theſe Tithes a *Modus*, as to the Manner of Tithing, is ſuggeſted, and not for the reſt; as that the 8th Sheaf, Shock or Cock ſhall be paid inſtead of the Tenth; that the Tenth of the Cheeſe made betwixt certain Days ſhall be paid for the Milk of Cows; 2. for a Lamb, Pig, &c. in theſe Caſes the Lands are † not diſcharged of Tithes in Kind, but only a Recompence comes in the Place of a particular Tithe by Preſcription, or a Preſcription doth direct the Circumſtances or Manner of paying the Tithe in Kind; as that the Tithe of young Beaſts ſhall be paid at a certain Age, though uncapable of living then without a Dam, &c. Now (ſays he) in theſe Caſes when the Tithes of Lands are not extinct, but the Lands are chargeable therewith, it ſeems to be * out of the prohibitory Clauſe *ſupra*. And the *Principal*, viz. *the Right of Tithes* remains of Eccleſiaſtical Cognizance, and that by Force of the ſame Statute (*quod negandum eſt*). And ſo the *Modus* that comes in by Allegation, and

* *Yes they are, by a Preſcription to the contrary.*

† *Note, this is the Saying of a* Civilian, *but our Law ſays the contrary.*

* *No, they are within the Words* Compoſitions Real, *&c.*

is

is dependant thereupon, is acceſſory thereunto, and being ſo acceſſory is alſo of the ſame Juriſdiction. And (ſays he) this was not denied to be the Rule of Law by the Temporal Judges, when it was urged by the *Civilians* in the (extrajudicial) Caſe *ſupra* of Lands abſolutely diſcharged of Tithes in Kind, and endeavoured to be proved by *Bacon*, Solicitor General, who was on the Part of the Clergy, from ſeveral Authorities, only they did not come up to the Caſe then under Debate; in which .... by Reaſon of the ſaid Clauſe, they had not Cognizance of the Right of Tithes in Kind, but only of the *Modus Decimandi.* The Authorities vouched by *Bacon* to prove the Rule *ſupra*, were 1 *Ric.* 3. 4. the Opinion of *Huſſey*, That when the Original ought to begin in the Spiritual Court, and afterwards a Thing comes in Iſſue, which is triable in our Law, yet it ſhall be tried by their Law; as if one ſues for a Horſe deviſed to him, and the Defendant ſays that the Deviſor gave to him the ſaid Horſe, this ſhall be tried there. And the *Reg.* 57, 58. If a Man be condemned in Expences in the Spiritual Court for laying violent Hands on a Clerk, and afterwards the Defendant pays the Coſts, and gets an Acquittance, and yet the Plaintiff ſues him againſt the Acquittance for the Coſts, and he obtains a Prohibition, for that Acquittances and Deeds are to be determined by our Law, yet he ſhall have a Conſultation, becauſe the Principal belongs to them. (But note, they muſt proceed therein according to the Rules of the Common

Prettily urged that the Modus *is dependant, and not acceſſory.*

Note.

Proofs thereof, but not ad Rem.

Note. Where Right of Tithes is conteſted by two Clergymen.

Law. 38 *E.* 3. 5.) That the Right of Tithes *between two Spiritual Perſons* ſhall be determined in the Eccleſiaſtical Court. And 38 *Ed.* 3. 6. Where the Right of Tithes comes in Debate between two Spiritual Perſons, the one claiming the Tithes as of Common Right within his Pariſh, and the other claiming to be diſcharged by Real Compoſition, the Eccleſiaſtical Court ſhall have Juriſdiction of it. (But this ſeems provided againſt by the Clauſe *ſupra*; *ergo Quære.*)

Suits in the Spiritual Court not prohibited.

To which may be added ſome modern Caſes, as, If a Suit be in the Spiritual Court for a *Modus Decimandi*, and the Defendant pleads Payment, this ſhall be tried there (they allowing ſuch Proof of the Payment as is ſufficient at Common Law) for that the original Suit was well commenced with them. *Goſling* and *Harding*. *Hob.* 314. 2 *Roll. Abr.* 305, 306 and 1 *Roll. Rep.* 12.

Note.

So no Prohibition ſhall be to a Libel for Tithes there, on ſuggeſting a Grant by Patent, which is cognizable at Common Law, becauſe the Spiritual Court has Cognizance of the Principal. See *Cumberba.* 29. And yet they cannot try a *Modus* or Preſcription there, though the original Suit be for a *Modus*, becauſe their Rules of Preſcription differ from ours. *ibid.* 427. But if the Queſtion be only Payment, or Non-payment, they may proceed. *Vide ibid.*

May try collaterally Releaſes.

So if a Man ſue for a Legacy there, and the Defendant pleads a Releaſe in Bar, which is denied by the Plaintiff, this ſhall be tried there, and no Prohibition ſhall be granted, for that this is a Matter ariſing from an original

original Cauſe, of which they have the Juriſdiction. See *Hob.* 255, and 2 *Roll. Abr.* 307. N°. 14.

So if an Adminiſtrator ſue for a Legacy due to the Teſtator, in that Court, and the Defendant pleads the Releaſe of the Teſtator in Bar, and the Plaintiff will avoid it, for that his Teſtator was an Ideot, this Ideocy it is ſaid ſhall be tried there, and no Prohibition ſhall be granted, for that they have Juriſdiction of the principal Matter. 2 *Roll. Abr.* 307. N°. 15. *Ideocy.*

So if a Parſon ſues in that Court, and the Defendant pleads that the Plaintiff was preſented upon a Simoniacal Contract againſt the Stat. 31 *Eliz.* this ſhall be tried there, for that they have Juriſdiction of the original Matter. See 2 *Roll. Abr.* 307. N°. 16. *Simony.*

After which he adds two Caſes, *viz. Robert's* Caſe and *Fuller's* Caſe, with the Arguments, Opinions, Objections and Reſolutions delivered in thoſe Caſes, as they are at large reported in 12 *Coke* 65. and 2 *Cro.* 269. To which I refer the Reader, and then adds, W. 624, 625. &c.

So it hath been alſo held, That where a Parſon ſued upon the Stat. of 2 & 3 *Ed.* 6. for the double Value, for not ſetting forth of Tithes, and the Defendant, to have a Prohibition, ſurmiſed that he ſet them forth, and that they would not admit the Proof thereof by one Witneſs, yet no Prohibition lies, for that they have Cognizance of the Matter. 2 *Roll. Abr.* 299. Quære de hoc; & vide de infra.

And then again urges the extrajudicial Reſolution of the Judges, 4 *Jac.* 1. before-

mentioned, That if the Queſtion be upon Payment or ſetting out of Tithes, or upon Proof of a Legacy or Marriage, or ſuch like Incidents, it was to be left to their Law, though the Party has but one Witneſs. But where the Matter is not determinable in the Eccleſiaſtical Court, their lies a Prohibition, either upon or without ſuch a Surmiſe. See 2 *Inſt.* 608. and wonders the Law is not ſettled as he would have it.

Note. Prohibitions for not admitting Proof by one Witneſs.

But he admits, That the very next Term after the Judges had ſo given their Opinion, (for it cannot be eſteemed a Reſolution, as he calls it) the Proof of the Revocation of a Will by one Witneſs being refuſed by the Eccleſiaſtical Court, the Court of King's Bench granted a Prohibition for that very Reaſon, which doubtleſs was conſonant to Law, and agreeable to many former and later Reſolutions. See *Yelv.* 92.

Alſo that in *Eaſter* Term, 41 *Eliz.* a Prohibition had been obtained upon a Surmiſe, That whereas a Parſon had ſued in the Spiritual Court for the Tithes of Pigeons, the Defendant there pleaded he had paid the ſaid Tithes, and proved it by one Witneſs, and that Court would not allow of the Proof without two Witneſſes; and the Prohibition was affirmed on Debate. See *Moor* 909.

So a Prohibition was granted for the ſame Cauſe upon a Suit there for the Tithes of Lambs. *Hetley* 87. and ſo held by *Dodderidge*, &c. in *Goſling* and *Harding*'s Caſe. 3 *Bulſ.* 241. and ſo reſolved ſince in many other Caſes.

And when a Suggeſtion was, That the Defendant in the Spiritual Court claimed the Tithes by a Leaſe from the Parſon of an elder Date, than that the Plaintiff claimed them by, who ſued him there by Force of a later Leaſe from the ſame Parſon; ſo that the Queſtion was, which of the two Leaſes ſhould be preferred? a Prohibition was awarded. And though *Croke* held that a Conſultation ſhould be granted upon the Authority of 1 *R.* 3. 4. before cited, That where the Spiritual Court hath Juriſdiction of the Principal, there, if an acceſſory come (or happens) which is triable at the Common Law, that alſo ſhall be tried there; yet *Coke* ſaid, That in one *Futter*'s (*Quære* if not *Fuller*'s Caſe *ante*) there was a Suit in the Spiritual Court for Tithes, and Title made by the Grant of the Rectory, and the other made Title by a former Grant, and a Prohibition was granted. And yet he agreed 1 *R.* 3. 4. to be Law, unleſs the Spiritual Law differs from our Law; as their Law is that a Gift of Goods is not good without Tradition; but otherwiſe it is at our Law; and *Dodderidge* ſaid, That the Principal Matter here was the Leaſe, which is Temporal and not Spiritual, and therefore is not within the Rule of 1 *R.* 3. 4. But true it is, That if the original be Spiritual, then the acceſſory ſhall be tried there alſo; otherwiſe not; all which (ſays he) *Coke* *granted. Who alſo ſaid, That if a Man make a Title in the Spiritual Court, by Force of a Leaſe of the Proprietor of Tithes, and

So when the Defendant ſuggeſted a prior Leaſe.

* *And well he might, if he held Tithes not to be Spiritual, or due* Jure Divino. *Q.*

and the Defendant deny the Leaſe, a Prohibition ſhall be granted, (inferring, as it ſeems, *That ſo it ſhall in a* Modus Decimandi, *where the* Modus *is denied; for a* Modus *in all Caſes does ſuppoſe a prior Grant, or Compoſition Real; which is properly cognizable at Common Law)* and in that Caſe, notwithſtanding the Opinion of *Dodderidge*, and *Coke*'s Conceſſions, (which are certainly Miſconceived) a Prohibition was granted *per Cur.* 1 *Roll. R.* 61.

Validity of Letters Patent not to be Tried there.

So a Prohibition was pray'd to the Spiritual Court on a Suggeſtion, That the Trial of all Letters Patent and Grants of the King ought to be at the Common Law, and not in the Eccleſiaſtical Court; and that the Defendant had libel'd in that Court againſt the Plaintiff for Tithes; and that his Title to the ſaid Tithe was by the King's Letters Patent, whereas the Plaintiff (who prayed the ſaid Prohibition) had a more antient Right to the ſaid Tithes by other former Letters Patent of the King; but the Libel in the Spiritual Court, in this Caſe, was only in the Common Form, *viz.* That he was Proprietor of the Tithes, without making any other Title; but upon the Proceeding, the Title did appear to be by Letters Patent on both Sides: And by *North*, Ch. Juſt. and *Windham* and *Charlton* Juſtices, a Prohibition was granted, for that the Eccleſiaſtical Court ſhall not Try the Validity of Letters Patent. *Mic.* 34 *Car.* 2. *C. B.* 3 *Lev.* 72.

Indeed,

Indeed, in that Caſe *Levins* was of a contrary Opinion, and argued, That the Suit in the Eccleſiaſtical Court was only grounded on the Tort in ſubſtracting the Tithes; and if the Title comes in Queſtion, there 'tis only as an Incident, *and in Suits at Common Law for Tithes, the Declaration is general as Proprietor, without ſhewing any Title in the Declaration.* And when the Foundation of the Suit is Spiritual, and Temporal Matter comes incidently in Queſtion, the Eccleſiaſtical Court ſhall try the Temporal Matter; ſo as they proceed therein, according to the Temporal Law; but when they proceed in a Temporal Matter, contrary to the Courſe, (or Practice) of the Temporal Law, then they ſhall be prohibited, and not before. That 12 *Co.* 65. a Rule is cited out of the *Regr. Quod non eſt conſonum Rationi, Quod cognitio Acceſſarii in Curia Chriſtianitatis impediatur ubi cognitio Principalis pertinet ad Forum Eccleſiaſticum*, and cited 1 *R.* 3. 4. *ut ſupra*, and 12 *Co.* 65 and 66, *Fuller* and *Whitehead*'s Caſe: And that they ſhall try the Validity of Livery, which comes incidently in Queſtion between two Grantees of a Rectory; and 3 *Cro.* 466. *Neſton* verſ. *Sharp.* 'Twas tried there, if one taken on a *Capias utlagatum*, five Years after the Judgment, ſhall be in Execution for the Party, and 3 *Cro.* 788. *Baker* v. *Royes*, they tried the Validity of an Act of Parliament for a Pardon, which came incidently there (*Quære* the Caſe) and *Trin.* 24 *Car.* 2. Sir *William Juxon* v. Lord *Byron*, where a Mortgage

Note; this admits Suits at Common Law for Tithes.

Vide Regr. 57, 58.

Note; 'tis no Grant ſans Livery.

was made of a Rectory, provided that the Mortgagor ſhall retain the Poſſeſſion 'till Default of Payment; a Default was made; and by an Act of Parliament the Rectory was taken out of one *Story*, a Truſtee, and veſted in Sir *William Juxon*, who before any Entry, ſued for the Tithes of the Rectory in that Court, and they Sentenced, That he could not; and a Prohibition was denied, for that at Common Law, one can't maintain an Action of Debt for the Tithes, before Entry, or a Recovery of the Rectory. See 3 *Lev.* 73. But *Quære* what need of a Prohibition in that Caſe, when it appears the Spiritual Court had diſmiſt the Suit there.

Note; the precedent Caſes are very partially related by Mr. *W.* and therefore are here taken from the Books themſelves; after this, he proceeds to cite the following Caſes, from 2 *Roll. Abr.* 306, 307, 308, *viz.*

If a Parſon leaſes all the Tithes of his Benefice to one Pariſhioner, and after ſues him *for his own Tithes*, no Prohibition ſhall be granted; for this Leaſe is a good Diſcharge there. 8 *E.* 4. 14. *per Choke, ſed Quære Librum.*

Other Caſes wherein Prohibitions have been denied.

If a Parſon compounds with a Pariſhioner for his Tithes, and grants them by Deed to him for a certain Sum by the Year, according to the Agreement, and afterwards ſues the Pariſhioner in the Eccleſiaſtical Court for the Tithes in Kind; yet no Prohibition ſhall be granted upon this Diſcharge by Deed; for they may well try it, having Conu-

Conuſance of the Principal: Reſolved *Paſ.* 16 *Jac.* 1. *B. R.* and a Prohibition, 'tis ſaid, was there denied. But before that, the contrary had been reſolved for the Church of *Wakerley*, and ſo it has been divers Times ſince; and the Law is now taken clearly contrary.

If a Parſon leaſe by Deed the Tithes of his Pariſh, and after ſues for the Tithes in the Spiritual Court, and there this Leaſe is pleaded, where the Queſtion betwixt them is, whether the Tithes of all the Pariſh, or of ſome particular Things are Let; yet no Prohibition lies, for that they have Cognizance of the Original; and they ought to take Advice of them that be learned in the Common Law for their Direction, as the Judges of the Common Law take Advice of them: But if they judge contrary to the Common Law, a Prohibition lies after Sentence. *Mich.* 13 *Car.* 1. Dr. *Pocklington* and Sir. ——— *St. John.* 2 *Roll. Abr.* 306, 307.

So if *A.* the Parſon of *B.* ſues for Tithes in the Spiritual Court againſt *B.* who pleads a Leaſe for Years made to him by the Parſon; and the Parſon Replies, That he was non-reſident, and abſent by the Space of Eighty Days, and more, in ſuch a Year, *&c.* from his Benefice, by which the Leaſe became void; no Prohibition lies upon this Plea, although it be grounded on the Statute 13 *Eliz.* and though it be objected, that the Judge of the Spiritual Court ſhall not have the Expoſition of a Statute; yet becauſe they have Juriſdiction of the Original Cauſe,

Cauſe, they ſhall have Power to try that which is Acceſſary ariſing thereupon. *Hill.* 14 *Car.* 1. *B. R.* Sir *Thomas Lucy* verſ. Dr. *Lucy*; *per Cur.* 2 *Roll. Abr.* 308. N°. 22.

Mr. W.'s *Caſes*, &c. *anſwered*, vide infra.

A Strange Plea, that charges himſelf with a Crime, *&c.* in order to take Advantage of it, which will not be permitted by either Canon, Civil, or Common Law, and therefore I doubt this Caſe is Miſtaken; or if rightly Reported, it can make little to the Purpoſe for which it is brought, ſeeing by the Plea the Leaſe is confeſs'd, and no Queſtion can ariſe upon the Act; for he charges himſelf with a Crime, of which he ſhall take no Advantage; and ſo the Act cannot be drawn in Queſtion: Which Anſwer either in the Whole, or in Part, may extend to many of his Caſes before recited; and as to the Reſt, many of them will be found on Examination to be adjudged directly contrary to the Point he urges them for; and many others are by him groſly Miſreported, or Miſrepreſented: And yet he concludes, (with Aſſurance) thus.

Mr. W.'s *irrational Concluſions.*

Theſe Caſes ſerve to prove, That, if upon a Suit for Tithes in Kind, a Leaſe be pleaded, and denied, the Validity thereof is to be tried in the Eccleſiaſtical Court; and alſo are in Proof of that Rule of Law, (as he calls it) That when the Eccleſiaſtical Court hath Juriſdiction of the Principal, it hath alſo Juriſdiction of the Acceſſory, tho' ſuch Acceſſory be otherwiſe of Temporal Cognizance: From all which (ſays he) we may conclude, That the Law formerly was taken to be, or at leaſt no Judgments, or Reſo-

Reſolutions were to the contrary, That if a Suit be for Tithes in Kind (not Extinct by Preſcription, or of Lands not Tithe-free) and a Preſcription, as to the Manner of rendring ſuch Tithes be ſuggeſted, and ſo comes in as Acceſſary upon the Suit for the Tithes, tho' it be to be granted, That the Trial of a Preſcription is otherwiſe Temporal, and to be tried at Common Law; yet when it comes in as an Acceſſary only to the principal Matter, of which the Spiritual Court hath Juriſdiction, it is to be tried there, and no Prohibition lies; and as it has been before ſhewed, That a Suit for a *Modus Decimandi* may be well commenced in the Spiritual Court; and that ſuch *Modus* may be tried there, as being purely Spiritual; and that no Suit can be brought for a *Modus* in the Temporal Court; therefore if a Temporal Matter coming in as an Acceſſary, ſhall be tried in the Spiritual Court, much more ſhall a *Modus Decimandi*, which is of Eccleſiaſtical Cognizance originally, be tried there, when that comes in as acceſſory only.

This is falſe by Mr. W.'s own ſhewing, ante.

Note this fine ſpun Period.

Yet (he grants) when a Parſon libelled in the Spiritual Court for the Tithe of Lambs, and the Defendant, to have a Prohibition, ſuggeſted a Cuſtom, That if one hath Lambs under the Number of Seven, he ought to pay one Half-penny for every Lamb under that Number, in lieu of all Tithes of Lambs; and if he had but Seven, the Parſon ſhould have the 7th Lamb, and ſhould pay 3*d.* and if Eight, he ſhould pay 2*d.* and if Ten, the Parſon ſhould have the 10th Lamb, without paying any Thing: *Berkly* and *Jones* held,

held, That the Canon Law is ſo, and ſo received in the Spiritual Court; and it is ſurmiſed that the Spiritual Court allows of it; and therefore there needs not any Prohibition. But becauſe it was alledged that it was a Cuſtom, and that the Parſon would ſtay 'till the Tenth did ariſe, and refuſed to accept according to the Cuſtom, and that in the Spiritual Court this Surmiſe was not allowed; *Bramſton* and *Croke* conceived that a Prohibition was grantable; and ſo *Jones* and *Berkley* agreed that it ſhould be granted, and that the Party might demur thereto, if he thought fit. 1 *Cro.* 403.

From all theſe ſeveral Caſes and different Opinions of the Judges one may indeed conclude, That the Law was very unſettled in theſe Matters in the Times of *Jac.* 1. and *Car.* 1. about granting Prohibitions to the Eccleſiaſtical Courts, in Caſe they took upon them to try any Temporal Matter, or refuſed Evidence, which was allowable at Common Law (which now they are obliged to do in Caſes of Wills, *&c.* by a late Statute) as Proof by one Witneſs, or the like. But ſince that Time, I take it, (whatever Mr. *W.* aſſerts to the contrary) thoſe Courts have been better regulated, and kept more within their Bounds than formerly; and this chiefly by Means of Prohibitions, whereby they are compelled to ſubmit Matters of Cuſtom and Preſcription, if denied or controverted there, to be determined by Juries at Common Law; and in Truth, how can a Matter of Cuſtom, which is private Common Law, be determined in any

Cuſtoms can only be determined by Juries at Common Law.

any another Manner than by a Jury at Common Law.

Q. if a falſe Suggeſtion is traverſable.

If one be ſued for Tithes of Lands not Tithe-free, and pleads a Preſcription for a ſpecial Manner of Tithing, which is not refuſed, (or if ſued for a *Modus Decimandi*, originally pleading another *Modus*, and his Plea is *bona fide* allowed) ſhall ſurmiſe falſly a Refuſal of his Plea, and for that Cauſe only a Prohibition ſhall be granted; the Queſtion is, Whether ſuch Surmiſe of a Refuſal may be traverſed? that is, when the Matter or Ground of the Prohibition is only the Refuſal. And it is ſaid, though the Temporal Courts will take Notice that no *Modus* is allowed in the Spiritual Courts, yet a *Modus* muſt be ſuggeſted to have been pleaded there in Time. 2 *Keb.* 721. And generally where a Suit is properly commenced in the Spiritual Court, Prohibitions are not granted 'till after the Plea there pleaded. See 1 *Keb.* 387, 433, 721. 1 *Sid.* 100, *&c.*

Where it contains other Matter fit for a Prohibition.

As to the Refuſal of a Plea being traverſable, if the Suggeſtion for a Prohibition doth contain other Matter upon which a Prohibition may be duly granted; as that upon a Suit for Tithes in Kind, That the Lands are Tithe-free by Preſcription, *&c.* though it be alſo ſuggeſted that this was pleaded in the Eccleſiaſtical Court, and refuſed, yet whether the Plea was refuſed, or not, is not traverſable; for the Party may have a Prohibition before any ſuch Plea pleaded by him in Diſcharge of Tithes; therefore in ſuch Caſes the Allegation of the

the Refuſal of the Eccleſiaſtical Judge, are Words more of Courſe than of Effect or Subſtance, (See 2 *Co.* 44. *Moor* 525.) and is no Part of the Matter iſſuable or material in the Plea, but put in only to aggravate the Contempt, and many Times falſly; and therefore the *Modus Decimandi* is prov'd by two Witneſſes, according to the Stat. 2 & 3 *Ed.* 6. *c.* 13. and not the Refuſal. 12 *Co.* Caſe *de modo Decimandi.*

Refuſal of a Plea, &c. where traverſable.

And yet it is granted, That in ſome Caſes the Refuſal of the Plea, *&c.* is traverſable, as it was adjudged in *Morris* and *Eaton*'s Caſe, vouched in 2 *Co.* 45. where the Caſe was; *Morris* was ſued by *Eaton* in the Spiritual Court for Tithes, where *Morris* pleaded or alledged, That *Eaton* did not read the Thirty-nine Articles, according to the Statute; and that the Eccleſiaſtical Judge refuſed to allow the ſaid Plea; this Refuſal was held traverſable by the Court of *B. R.* for otherwiſe, upon ſuch Surmiſes, all Matters might be prohibited in the Spiritual Court, although that the Spiritual Judge did all that belong'd to Law and Juſtice; and in the ſame Caſe the Party grieved may have his Remedy by Way of Appeal.

From all which (ſays Mr. *W.*) it may be collected, that if the Suggeſtion contains no other Matter, upon which a Prohibition ought to be granted to the Spiritual Court, beſides the Refuſal of the Plea there, which by the Common Law is a good Plea, and ought to have been allowed; in ſuch a Caſe the Refuſal is traverſable, as 3 *Keb.* 332.

Peters v. *Prideaux*. Therefore, ſuppoſing that a *Modus Decimandi*, or a Preſcription of a Manner of Tithing, is triable in the Spiritual Court, if in a Suit there for a *Modus Decimandi*, another *Modus* be pleaded, or that there is no ſuch *Modus*, and that Plea is refus'd; or if in a Suit for Tithes of Lands not Tithe-free, a Preſcription is pleaded as to the Manner of Tithing, and that Plea is refuſed, and a Prohibition being moved for upon a Suggeſtion of ſuch Refuſal, the Refuſal being the principal Matter of the Suggeſtion is therefore traverſable.

Where no Prohibition 'till Plea refuſed.

And in all Caſes where the principal Matter is proper to the Spiritual Court, there no Prohibition ſhall be granted 'till the Plea refuſed.

Oath of the Suggeſtion.

And note; the Courts of Common Law, on Suggeſtion of ſuch Refuſal, do oblige the Party that moves for a Prohibition to make Oath of the Truth of ſuch his Suggeſtion, and will not grant any Prohibition without ſuch Oath be made. 3 *Keb.* 217.

Stat. 2, 3 *Ed.* 6. Copy of the Libel to be produc'd, and Suggeſtions to be proved within 6 Months.

And it is alſo by the Statute 2 & 3 *E.* 6. *c.* 13. enacted, *That no Prohibition ſhall be granted in Matters of Tithes in any of the King's Courts, unleſs the Party that requires the ſame bring and deliver to ſome of the Court, where he prays ſuch Prohibition, a true Copy of the Libel ſubſcribed by the Hand of the Party, and the Suggeſtion underwritten, and that if he do not prove that Suggeſtion by two honeſt ſubſtantial Witneſſes in the ſame Court within ſix Months after the Prohibition granted and awarded, then the Party delayed ſhall have a Conſultation without delay, and double Coſts to be*

be aſſeſſed by the Court where the Conſultation is ſo granted, to be recovered in an Action of Debt, &c. *wherein no Eſſoign*, &c. *ſhall be allowed.*

Obſervations upon this Clauſe.

This Clauſe of this Statute ſeems to give the Parſon, Vicar, *&c.* a double Remedy where the Suggeſtion is not proved within ſix Months, that is a Conſultation; and ſecondly, double Coſts. See *Hoskins* verſ. *Stroade. T.* 5. *Car. Rot.* 988. *B. R. Cockeram* verſ. *Davyes. Hill.* 22 *Jac. Pop.* 159. *Jones* 231. *Cro. Car.* 308. 2 *Inſt.* 662.

But in both theſe they are in ſome Meaſure fruſtrated in their Expectations: For as to the firſt, after ſuch Conſultation a new Prohibition may be obtained; and beſides, there are ſeveral Caſes wherein the Party cannot, or needs not prove his Suggeſtion, notwithſtanding this Statute; as where the Suggeſtion is in the Negative, which regularly cannot be proved: Secondly, if the Suggeſtion be grounded upon any Matter of Law; as in Caſe the Suit be for Things not Tithable, great Wood, Things *feræ Naturæ*, &c. this appearing in the Libel, a Prohibition lies, and there needs no Proof of the Suggeſtion. See 2 *Inſt.* 662.

If a Suggeſtion contain two Matters, and the one ought to be proved within ſix Months, and the other here, though the Party fail in proving that Part that ought within this Law to have been proved; yet no Conſultation ſhall in this Caſe be granted. *Cobbe* verſ. *Hunt.* 5 *Jac. B. R.*

Aſleight

A ſleight Proof will ſerve in this Caſe; as to ſay they have known it ſo, or that common Fame is ſo. *Noy* 28.

And if the Suggeſtion be proved before a Judge within the ſix Months, though not recorded till after, it ſuffices. *Noy* 30, 44.

To the ſecond here is double Coſts to be awarded for want of proving the Suggeſtion, and no Execution given, but an Action of Debt to recover it; which is but a bad Remedy in this Caſe, when the Party ſhall only recover the Coſts, and have no Coſts allowed him in the ſecond Suit. *Sed Quære.*

If a Man have a Prohibition, and do not prove the Suggeſtion within the ſix Months, and the Defendant takes Iſſue upon it, which is found againſt him, in this Caſe the Defendant ſhall have no Coſts. See *Noy* 81.

In what Caſe Prohibitions are Peremptory in themſelves.

It is to be obſerved that ſome Prohibitions are in themſelves peremptory; as where there is a Suit in the Spiritual Court for Things not Tithable, and appearing ſo in the Libel, in which Caſes a Conſultation ſhall never be granted: And ſo it is, if the Suit be for carrying away Tithes after they are ſet forth, unleſs it be between Clergymen in their own Rights: And ſo it is where the Matter is determinable at Common Law, and the ſame appearing in the Libel.

Where ex poſt facto.

But where a *Modus Decimandi*, a Cuſtom of not Tithing, a Privilege within the Statute of 31 *H.* 8. for Abby Lands, and in ſuch other Caſes, where the Suggeſtion is grounded upon Matter of Fact, which is doubtful to the Court, thoſe Prohibitions

are not peremptory 'till the Matter of Fact be tried, and found true by Verdict.

And note, that the Reverſioner may have a Prohibition upon a Suit againſt his Tenant. *Moor* 919.

But note; it is a Queſtion whether two, that are ſu'd ſeverally in the Spiritual Court, may upon the ſame *Modus* join a Prohibition. *Hetley* 147.

How to proſecute and defend Prohibitions.

The Manner of proceeding in the obtaining, proſecuting, and defending of Prohibitions is in this Manner:

The Party that is ſued in the Spiritual Court, and deſires a Prohibition, moves the Court, and for the moſt part makes his Suggeſtion by his Counſel *ore tenus* at Bar: If the Suggeſtion be ſuch, upon which a Prohibition cannot be denied, the Court uſually gives Rule, that the Party ſhall at a certain Day come to ſhew Cauſe why a Prohibition ſhould not be granted, and that in the Interim Proceedings in the Spiritual Court ſhould be ſtay'd: Upon ſerving this Rule in due Time, and Oath made of it, if the Plaintiff in the Spiritual Court do not appear at the Day, and ſhew good Cauſe to the contrary, the Prohibition is awarded, and the Rule made peremptory; but if the Court be doubtful, whether the Matter be ſufficient to ground a Prohibition, or no, then, or at the Prayer of the Defendant, the Court will order the Plaintiff to draw up his Suggeſtion into Form, and then the Court will conſider of the Matter, or the Defendant may demur to it, and the Matter argu'd by

by learned Counſel; and then the Court as they ſee Cauſe, will either award the Prohibition, or diſcharge the Rule. But if the Matter ſuggeſted be a good Ground for a Prohibition, but is in it ſelf falſe or doubtful, the Defendant in the Prohibition may demand a Declaration of the Plaintiff's Attorney, which is grounded upon a ſuppoſed Attachment for not obeying the Prohibition; to which the Defendant may plead as Counſel ſhall adviſe him, and traverſe and put in Iſſue the Matter of the ſaid Suggeſtion, or ſuch other Matter as Counſel ſhall adviſe, which is to be tried by a Jury of the Country; if it paſs with the Plaintiff, then is the Prohibition become Peremptory; but if the Verdict paſs for the Defendant, regularly a Conſultation is awarded, that is, a Writ directed to the Judge of the Spiritual Court, authoriſing him to proceed notwithſtanding the Prohibition. If a Man be ſued in the Spiritual Court for the Tithes of Wood, Herbage, *&c.* and a Prohibition granted, becauſe the Wood was burnt in the Houſe, or the Cattle bred for the Plough or Pail, the Defendant may plead that the Wood or Cattle were ſold, and traverſe the Suggeſtion. *Litt. Rep.* 367.

Stat. 50 E. 3. cap. 4. *Where a Prohibition may be had after Conſultation.*

Now, by a Statute made in the 50 *E.* 3. it is enacted, *That where a Conſultation is once duly granted, upon a Prohibition made to the Eccleſiaſtical Judge, that the ſame Judge may proceed in the Cauſe by Virtue of the ſame Conſultation, notwithſtanding any other Prohibition thereupon to be delivered; provided always that the Matter in the Libel of the ſaid*

Cauſe be not ingroſſed, inlarged, or otherwiſe changed.

But this Statute has been ſeveral Times held to extend to ſuch Cauſes only, where Conſultations are judicially granted upon Examination of the Cauſe, and not where they paſs of Courſe, as for want of Proof of a Suggeſtion, or upon Nonſuit for want of Proſecution, or where the firſt was granted for want of a Copy of the Libel, or ſuch like. See *Jones* 231. *Cro. Car.* 208. *Poph.* 159, &c. *Moor* 917.

Conſultations ſub modo.

Sometimes the Court grants a Conſultation *ſub modo*; as where the Matter of the Libel is in the Disjunctive, and as to one Part the Court has Juriſdiction, and to the other not, there the Court may grant a Conſultation, as to that Part that the Spiritual Court has Juriſdiction of, and let the Prohibition ſtand as to the other. See 5 *Co.* 68. *a.* 12 *Co.* 44.

Or a Conſultation may be granted, ſo that the Spiritual Court allow ſuch Plea of ſuch Proof. See *Sommers* v. Sir *Ric. Bulkeley. T.* 32 *El. B. R. Poph.* 58. *Hob.* 179.

How the ſix Months to prove a Suggeſtion are to be accounted.

Note, That the ſix Months for the Proof of the Suggeſtion are according to the Kalendar, and not twenty-eight Days to the Month. See 5 *Co.* 68. *a.*

And note, in the Caſes before put, the Prohibition ſhall be general, and the Conſultation ſpecial, *quoad, &c.*

Where no Conſultation ſhall be granted upon a Verdict for the Defendant.

And it is taken for a Rule in *Hobart*'s Reports, that though a Prohibition be faulty, yet the Defendant ſhall never have a Conſultation, if it appear to the Court that

the Suit in the Eccleſiaſtical Court was not well grounded. See *Hob.* 300. *Dyer* 171. *p.* 5, 6.

And therefore where one ſued for the Tithe-Corn of ſixty Acres of Land, and the Defendant ſuggeſted, it was Barren Ground, and paid no Tithe, and pray'd and had a Prohibiton, and the Jury found that thirty Acres of it were ſo, and that the other thirty were Barren, but had paid Tithe Wool and Lamb; and a Conſultation denied, becauſe it appeared the Plaintiff had no Cauſe to ſue for Tithe-Corn. *Vide ibid.*

So if one lay a *Modus* for the whole Town, and proves it for himſelf only, no Conſultation ſhall be granted. See *Noy* 28.

So in a Prohibition it was ſuggeſted, that the Parſon had twenty Acres of Land, and ten Acres of Wood, in Diſcharge of all Tithes, and the Proof was that he had twenty Acres of Land only; and a Conſultation denied, becauſe it appeared he had no Cauſe of Suit. See *Moor* 911. *Auſten* v. *Pigot*, *Cro. El.* 736.

Prohibition after Sentence.

Regularly a Prohibition ought not to be granted after Sentence, unleſs it appear the Sentence were obtained in the Vacation, or by Surpriſe, ſo that the Party had not Time to pray it ſooner, or upon Matter ariſing after the Sentence, and the granting or not granting reſts much in the Diſcretion of the Court. *Hob.* 97. *Noy* 70. *Winch.* 8. *Cro. El.* 596. *Hob.* 67.

After Conſultation.

And ſo ſometimes upon new Matter ariſing after a Conſultation, a Prohibition may be granted, notwithſtanding the aforeſaid

Statute of 50 *E.* 3. as where the Spiritual Court after Conſultation, proceeds to try Matter determinable only at Law; or if after a Conſultation the Spiritual Court will make an unjuſt Decree, as to award treble Damages: And ſo in all Caſes if the Spiritual Judge will proceed illegally, and againſt the Common Law, after a Conſultation a new Prohibition may thereupon be obtain'd, but not upon any Matter alledg'd in the Libel. *Hob.* 286. *Hubges* 245. *Hill.* 11 *Jac. C. B. Baldum* v. *Geery.*

Variance between the Libel and the Plea.

To which I ſhall add, as explanatory of ſome of the former Poſitions, the Caſe of *Stratford* v. *Neal. Mich.* 7 *Geo.* 1. in *B. R.* which was on a Writ of Error brought here on a Judgment in the King's Bench in *Ireland, viz.*

Prohibition and Declaration thereon.

One *Neal* libelled in the Spiritual Court there, *for two third Parts of the Tithes due to him for dry Cattle* fed in ſuch a Pariſh, and the Defendant there ſuggeſted for a Prohibition, that the Cattle for which thoſe Tithes were demanded, were Beaſts of the Plough, and other dry Cattle fed in the ſaid Pariſh with Hay and Stubbles of Corn, for which Tithes had already been paid; whereupon a Prohibition was granted; and that the Right might come in Queſtion, the ſaid *Stratford* was ordered to declare upon the Prohibition, which he did in the ſame Manner as he had before ſuggeſted, and concluded his Declaration, that the Defendant had proceeded in the Spiritual Court after a Prohibition delivered, *&c. Et contra Prohibitionem, &c.*

The

The Defendant pleaded, That the Cattle for which he had demanded the ſaid Tithes, were not ſuch as the Plaintiff had ſet forth in his Declaration, nor fed with ſuch Hay and Stubble; and further, That he had a Right to *two integral Parts of the Tithes of all dry Cattle* fed in that Pariſh, and that he had not proceeded *contra formam Prohibitionis.* *Plea thereto.*

Upon this they were at Iſſue, and the Defendant had a Verdict, and Judgment for a *Conſultation*, which was accordingly awarded. On which Judgment *Stratford* brought a Writ of Error, and it was urged for him that there was a Variance in the Pleadings, and that the Verdict would not ſupport the ſaid Judgment. *On Iſſue for Defendant, a Conſultation, and thereon a Writ of Error.*

Firſt, As to the Variance in the Pleadings, That the Plaintiff in the Spiritual Court had by his Libel demanded *two third Parts of the Tithes* due to him for dry Cattle, and being Defendant in the Prohibition, he claimed a Right to *two integral Parts of the Tithes*, &c. So that his Plea varies from his Libel, and therefore a Conſultation ſhould not be awarded, becauſe then he would have a Power to ſue for any Thing not in the Libel. *Firſt Objection, Variance in the Plea*, &c.

To which it was anſwered, That the Awarding a Conſultation is no more than giving the Defendant Liberty to proceed on his former Libel in the Spiritual Court, and conſequently if there is any Variance between the Libel and the Plea, it is no Cauſe to reverſe the Judgment, becauſe the Conſultation gives him no new Power to ſue for *Anſwer.*

any Thing, but only the very Libel which he had already exhibited. And in the Debate of this Point were cited *Plowd.* 468. 471. 1 *Leon.* 241. 2 *Rep.* 43. 1 *Saund.* 81, 82, 140, 143. 1 *Show.* 201. *Lutw.* 1043.

Second Objection to the Verdict.

Then, as to the Verdict, it was objected, that the Jury found that the Cattle for which the ſaid Tithes were demanded, were not fed with Hay and Stubbles, for which Tithes had been already paid, but they did not find that there were any Proceedings in the Spiritual Court after a Prohibition delivered, and therefore it was inſiſted (for the Plaintiff here) That if all the Iſſues are not found, this Judgment cannot be ſupported; and it is Part of this Iſſue that the Defendant had proceeded in the Spiritual Court, after a Prohibition deliver'd; and if this had been found, then the Plaintiff would have been entitled to Damages.

It is true, if an Iſſue is joined on Part of a Thing in Suit, and that Part is found by the Jury, ſuch a finding will ſupport the Judgment; but when ſeveral Iſſues are joined, (as in this Caſe there are) and ſome are found, and ſome are not found, there the Verdict is inſufficient; and for this were cited *Plowd.* 271. 3 *Lev.* 39. 1 *Vent.* 34, 38. 2 *Jon.* 188.

And it is certain the Plaintiff would have been entitled to Damages, if this Matter had been found, for there is an Authority in Point, *viz.* 1 *Ventr. ſupra*; where it was ſo found, and the Plaintiff had Judgment for his Damages; it is true that Judgment was reverſed, but it was becauſe the Plaintiff had

had not laid any Venue where the Proceedings were, *&c.* after the Prohibition delivered.

To which it was anſwered, That this Objection is only to Matter of Form, which is cured by the Verdict, for ſo is the not finding any Proceedings by the Defendant, after a Prohibition delivered, *& contra Prohibitionem, &c.* all which is merely formal, and like the not finding the Breaking and Entry to be *vi & armis* in an Action of Treſpaſs. See 1 *Leon.* 115. *Moor* 182. 13 *Co.* 58. *Anſwer.*

And *per Cur.* The Awarding a Conſultation is no more than ſetting aſide the Prohibition, and giving the Plaintiff in the Spiritual Court Liberty to proceed on his Libel; and that the Variance between the Libel and the Plea here, is not material. For though in the one *two third Parts* are demanded, and in the other *two integral Parts*, yet that muſt be underſtood *ſecundum ſubjectam materiam.* Curia.

And as to the other Objection (againſt the Verdict) it is true, where ſeveral Iſſues are joined, a Verdict which finds one and not the other, is not good; but the not finding any Proceedings in the Spiritual Court *contra formam Prohibitionis* is but Matter of Form: However, this Verdict hath found all the *material* Points in Iſſue, and therefore it is ſufficient to ſupport the Judgment. *Where ſeveral Iſſues joined, and Verdict only for one.*

Now the Alledging in the Declaration, That the Plaintiff in the Spiritual Court had proceeded there *contra formam Prohibitionis*, is but a ſuppoſed Contempt, and ſuggeſted by the Plaintiff in the Action, as a Ground for a Prohibition, and the not finding

finding this Contempt is altogether immaterial, and the ſame with not finding *vi & armis* in an Action of Treſpaſs. It is true, there are Precedents both Ways, but in ſuch Caſes the Judges always follow that which is leaſt Prejudicial.

And as to the Caſe in *Vent.* 34, 38. there was actually a Proceeding after a Prohibition granted, and ſo found by the Jury, and Damages aſſeſſed accordingly; but the Venue being laid in a wrong County, the Jury could not ſubject the Defendant to the Damages, and therefore that Judgment was ſet aſide; ſo it is out of this Caſe.

Beſides, if the Plaintiff would have had any Advantage by the Defendant's Proceedings after Prohibition; this being Matter of Evidence, the Plaintiff ſhould have proved it at the Trial, and there have inſiſted on his Damages, which he had not done; and therefore Judgment was affirmed by the whole Court.

Judgment affirmed.

CHAP.

CHAP. X.

Of Actions for Tithes, &c. at Common Law, by and againſt whom, and in what Caſes they lay; alſo of Actions for the treble and Suits for the ſingle Value, on the Statute 2 & 3 Ed. 6. c. 13. In what Courts of either Law or Equity to be proſecuted; and the Courſe of Proceedings at Law therein, from the Commencement of the Action to the Judgment, and Execution thereupon, with the ſeveral Statutes giving Juriſdiction to Juſtices of the Peace in Caſes of Tithes, viz. 7 & 8 W. 3. c. 6. and c. 34. and 1 Geo. 1. c. 6.

Actions at Common Law for the Parſon, for not ſetting out Tithes, &c.

WE have before ſhewn, That an Action lay at the Common Law in divers Caſes, either for the Parſon where Tithes were not duly ſet forth, as *Noy* 126, 152. 2 *Leon.* 101, 1 *Brownl.* 34. 13 *Co.* 23. 2 *Inſt.* 649. *See* Degg, 405, 406.

649. or where detained or with-held from him, as *Hob.* 247. 2 *Cro.* 324. 3 *Cro.* 697. 843. 1 *Brownl.* 123. *Moor* 912. *Yelv.* 92. 1 *Jon.* 230. 1 *Roll. Rep.* 420. 3 *Keb.* 570. 3 *Mod.* 283. and ſo are the Words of the Stat. 32 *H.* 8. c. 7. and that, if Tithes were ſet out, and after carried away by the Owner of the Land, the Parſon before the ſaid Statute might have either ſued in the Spiritual Court, or had his Action of Treſpaſs, *&c.* at Common Law. See 10 *H.* 4. 2.

Againſt the Parſon for not taking them away, &c.

And that in like Manner an Action of Treſpaſs or Caſe, by the Owner of the Land, lay againſt the Parſon for not carrying away his Tithes in Time, *&c.* See *Noy* 31. 3 *Bulſtr.* 336. *Godbo.* 329. *Ley* 70. *& ante.*

Notice where neceſſary.

But note; to maintain the Action in that Caſe, the Owner ought to give the Parſon Notice, that the Tithes are ſet forth. See 1 *Roll. Abr.* 643. *Stile* 342. and 2 *Ventr.* 48. Tho' he is not obliged to give Notice in other Caſes. *Vide ante.*

And if, after the Tithes are ſet forth, and Notice thereof given to the Parſon, he ſends his Servant to fetch them; but the Pariſhioner threatens the Servant, and will not ſuffer him to carry them away; and after that the Parſon leaves them a long Time to remain upon the Ground, whereby the Graſs is Damnified, yet no Action lies againſt the Parſon until a new Requeſt made to take away the Tithes. See 1 *Roll. Abr.* 109.

But tho' the Action lies againſt the Parſon in that Caſe, for not carrying away of Predial Tithes, as Corn or Hay, yet it ſeems

to

to be doubted whether it lay for not taking away of Tithe Cheeſe, or other mixt Tithes. 2 *Roll. Rep.* 128. *Godbolt* 329. But in Dr. *Bridgman*'s Caſe, in *Noy*'s *Rep.* and in the Caſe of *Wiſeman* againſt the Rector of *Landen* in *Eſſex*, cited in *Godolphin* 377. an Action ſeems to lie againſt the Parſon for not accepting the Tithe of Cheeſe in Time.

Tithes diſtrein'd Damage Feaſant.

Alſo the Law ſeems to be, That if the Tithes remain too long upon the Land, *&c.* the Owner of the Soil may take them Damage Feaſant; but then (if he be ſued for taking them,) he, to juſtify, muſt ſet forth how long they had remained before he took them; and what ſhall be ſaid a Remaining too long is triable by a Jury. See 1 *Roll. R.* 212. *Ley* 70. *Latch.* 8. 3 *Bulſt.* 336. and *Godolphin* 329. and whoever takes away Tithes, not having a Right ſo to do, is a Treſpaſſor; nor are Tithes payable by any but ſuch as have a lawful Property in the Thing tithed; *ergo* not of Things ſtollen, *&c.*

Againſt a Diſſeiſor, &c.

Alſo an Action at Common Law lies againſt a Diſeiſor for taking the Tithes; or if one cuts them, and another carries them away, it lies againſt either of them, upon the Statute 2 & 3 *Ed.* 6. *Paſ.* 15. *Car. B. R.* See *Godolph.* 445. and if a Leſſee for Years be ſued in the Spiritual Court for Tithes, he in the Reverſion may have a Prohibition. See 1 *Cro. Love* verſ. *Piggot*; and if any Layman, lawfully intereſted in Tithes, be diſſeized thereof, or wronged therein, he may have his Remedy for them, or Damages for the Wrong, in the King's Temporal Courts, by the ſaid Statute 32 *H.* 8. and 2 & 3 *Ed.* 6.

By a Reverſioner, Diſſeiſee, &c.

(and

(and ſo I conceive he might by the Common Law before the ſaid Statute) but this 'tis ſaid does not deprive him of his Remedy for them in the Spiritual Court. See 11 *Co.* 13. *Dyer* 133. Note; the Action will lye by Executors, but not againſt them. *Syderf.* 88. 181. See further by and againſt whom the Action will lie. *Degg* 397, 398.

Election of Suit in the Spiritual or Temporal Courts.

Alſo for Refuſal to pay Tithes, or not ſetting forth Predial Tithes, the Parſon may either Libel in the Spiritual Court, or he, or any other Proprietor thereof, may Sue at the Common Law for the ſaid Tithes, or for the Subſtraction thereof, at their Election, and recover the treble Value of the Tithes, as was adjudged in *Wood*'s Caſe. *P.* 29 *Eliz.* See 2 *Inſt.* 650. and *Hill.* 40 *Eliz. C. B. Rot.* 699. *Bedells*'s Caſe.

Right of Tithes not.

Where only the Right of Tithes comes in Debate (and not the Right of Patronage) there it has been held, That the Eccleſiaſtical, and not the Temporal Court, ſhall take Cognizance thereof, although both Parties claim by Preſcription, which in it ſelf is a Matter properly triable at Common Law; and ſo it was adjudg'd *Mich.* 29 *El.* in *B. R.* as *Godolphin* reports *Pag.* 446. and cites 22 *E.* 4. 24. and 35 *H.* 6. 39. But ſee 13 *Co.* 38, 39, 40, 46. 38 *H.* 6. 20, *per Forteſcue*, and 26 *H.* 8. 3.

Annual Penſions.

But where the Parties Litigant are both Eccleſiaſticks, and the Claim of the one be for an *Annual Penſion* out of the Parſonage of the other, although he claim the ſame by Temporal Grounds, (*viz.* by Preſcription and Real Compoſition) he hath his Election

to ſue in either Court as aforeſaid; yet if there be a Contention *de jure decimarum originem ducens de jure Patronatus, tunc cognitio ſpectat ad Legem civilem*, i. e. *Communem*. See *Godb.* 63.

And tho' by Statute 34 *H.* 8. an Eccleſiaſtical Perſon may ſue for Penſions in the Eccleſiaſtical Court; yet if he brings a Writ of Annuity for the ſame, and Declares upon a Preſcription, he has then determined his Election; and if afterwards he ſue for his Annuity in the Eccleſiaſtical Court, a Prohibition will lie. See *Parſons Law* Pag. 292.

If a Suit be in the Eccleſiaſtical Court between a Parſon and the Vicar for Tithes, a Prohibition hath always been denied, if there be not other Matter in the Caſe determinable by the Common Law. See *Mich.* 16. *Jac.* 1. *Roll. Rep. Quære Moor* 1267.

Yet it is held, That a Real Contract (or Compoſition) tho' made between Eccleſiaſtical Perſons, and even of Eccleſiaſtical Things, is only cognizable at the Common Law. See *March*'s Reports 87. And yet it is ſaid, That if a *Modus Decimandi*, or Cuſtom of Tithing be agreed by and between both Parties, it may be ſued for in the Eccleſiaſtical Court. But if the *Modus*, or Cuſtom be denied, a Prohibition may be awarded 'till it be tried at Common Law. *Hob.* 247. *Real Contract.*

But where there is a *Modus Decimandi*, be it of Lands, or a certain annual Sum of Money, or other Profit, Time out of Mind given to the Parſon and his Succeſſors, in full Diſcharge of all Tithes in Kind, in ſuch a Place *Tithes in Kind*, &c.

Place certain, if the Sum be not paid, the Parſon may not ſue for Tithe in Kind, but for the Money, &c. in the Eccleſiaſtical Court; and yet the *Modus* itſelf is not triable there, but at the Common Law. See 12 or 13 *Co.* 40, 46.

After they are carried away.

Alſo after the Tithes are carried away out of the Ground, it has been held, That a Suit cannot then be commenced for them in the Eccleſiaſtical Court, becauſe they are then become Lay Chattles, and the Property or Nature thereof is then altered. See 1 *Roll. Rep. Reynolds* v. *Hayes*, and 38 *E.* 3. 13. *per Finchden.*

Note.

And note; for the not ſetting forth of Tithes, not only the Parſon or Rector, but alſo the Farmer of the Rectory may ſue upon the Statute 2, 3 *Ed.* 6. in the Courts at Common Law. *Moor* 192. And it ſeems he may for detaining, or with-holding thereof, or carrying them away, &c.

Tithes when Lay Chattles.

But 'tis ſaid, the bare ſevering or ſetting forth of Tithes, doth not make them become Lay Chattles, but the carrying them away out of the Ground doth, (and ſo it ſeems doth any other Poſſeſſion of the ſame, as putting them in a Cart, &c.)

And therefore, if the Tithes be ſevered, and ſet forth, and afterwards the Parſon leaſes out his Parſonage, not mentioning the Tithes, yet the Tithes ſo ſet forth ſhall paſs; for although they are divided and ſevered, yet they are as yet Spiritual Duties of the Parſonage; but if the Tithes are carried into Barn, &c. (or any other Sort of Tithes be paid to the Parſon) and afterwards

wards the Parſon leaſes the Parſonage with all Profits, *&c.* theſe ſhall not paſs to the Leſſee, who after that takes the Parſonage; for that now they are become Lay Chattles; adjudg'd in one *Smith*'s Caſe in *C. B. Mic.* 6. *Jac.* 1.

And it was agreed in *Cannen*'s Caſe, *Hill* 6. *Jac.* 1 *Roll. Rep.* That if a Pariſhioner ſever his Hay, and it be made into Ricks or Cocks, and he after ſell it (on the Ground) the Parſon cannot ſue the Vendee for the Tithes thereof, but him that ſevered it, and on this Matter a Prohibition was granted. *Hill* 16 *Jac.* 1. *B. R.* 1 *Roll. Rep.*

Actions on Stat. 2 & 3 Ed. 6.

If a Pariſhioner doth not ſet forth his Tithes, or ſubſtracts them after they are ſet forth, the Parſon may Libel againſt him in the Spiritual Court, or elſe by the Statute 2 & 3 *Ed.* 6. *c.* 13. the Parſon, or other Proprietor of the Tithes, may have their Action in the King's Temporal Courts for the not ſetting them forth, or for ſubſtracting of them, at their Election; and ſhall recover the treble Value in an Action of Debt.

Debt for the Treble Value.

To the Parſon by Implication.

For although the treble Value be not given to the Parſon, or other Proprietor of the Tithes, by any expreſs Words in the Statute; yet, for as much as he is the Party grieved, and hath the Right of the Tithes in him, the treble Value is given to him: *For whereſoever a Statute gives a Forfeiture, or a Penalty, againſt any one who wrongfully detaineth or diſpoſſeſſeth another of his Right or Intereſt, in that Caſe he that hath the Wrong, ſhall have the Forfeiture or Penalty, and ſhall have his Action at the Common Law for the*

Note.

ſame: Or elſe, in the Caſe *ſupra*, he may ſue in the Spiritual Court; adjudg'd in *Wood*'s Caſe, 2 *Inſt.* 650. 3 *Cro.* 608. 13 *Co.* 48. 2 *Cro.* 70. *Moor* 710. *Coke*'s *Entries* 162. and *Bedle*'s Caſe in *Godbolt*. *Vide infra.*

In Temporal Courts no Coſts.

But in his Action at the Common Law he ſhall recover no Coſts, as adjudged in Sir *Moyle Finch*'s Caſe; and ſee *Hill.* 40 *El. B. R. Rot.* 699. *Bedel*'s Caſe accords.

In Spiritual only double Value and Coſts.

And if the Parſon, or other Proprietor, will ſue in the Eccleſiaſtical Court for Subſtraction of Tithes, he ſhall recover there but the double Value of them, becauſe in that Court he ſhall recover the Tithes themſelves, and Coſts, which is equivalent to the treble Value at the Common Law; for at the Common Law he ſhall recover no Coſts, but in the Eccleſiaſtical Court he ſhall recover Coſts and Expences. See 2 *Inſt.* 651.

Queſtions on the treble Value.

Now concerning the treble Value on the ſaid Statute 2 & 3 *Ed.* 6. two Queſtions have been made, *viz.* Firſt, To whom the ſaid Penalty was given; and ſecondly, in what Court it is to be recovered.

As to the firſt Queſtion, ſome have thought that the treble Value was given to the King, it not being, by any expreſs Words in that Statute, limited, or made payable to any one. *Savil* 63. But the contrary has been reſolved, and that it ſhall be given to the Party grieved. See the Caſes cited *ſupra.*

Why the Forfeiture to the Party grieved.

And note; the Reaſon of theſe Judgments ſeems to be, That tho' all Forfeitures at Common Law, as alſo Forfeitures given by Act of Parliament, by Reaſon of any Offence committed againſt the publick Juſtice

of the Nation, and not appointed to any particular Perſon, ſhall be to the King, as the Head and Fountain of Juſtice, and who is thereby ſuppoſed to be the Perſon offended and injured by ſuch Offence. Yet, when a Forfeiture given by Act of Parliament, appears not to be intended merely as a Puniſhment for the Offence committed, but as a Recompence to ſome particular Perſon injured, for the Damages he has thereby ſuſtained: In ſuch Caſe, tho' no particular Perſon be by ſuch Statute expreſs'd or appointed to have the Penalty and Forfeiture; yet the Party damnify'd ſhall have it as a Recompence and Satisfaction for the Damage he hath ſuſtained by the Offence; and accordingly the Forfeiture and Penalty given by this Statute, hath been expounded to be as a Satisfaction intended for the Tithes ſubſtracted, and therefore to belong to him, whoſe Right it is to have the ſaid Tithes. See *Moor* 238. Dr. *Bonham*'s Caſe, and *ib.* 710. and 8 *Co.* 119. *b.* But the Statute being prohibitory, if the Party does not ſet forth his Tithes, he may be fined to the King upon an Information or Indictment, as was ſaid. See *Moor* 911. *Savil* 62.

In what Court the treble Value is recoverable.

Secondly, the next Doubt has been, in what Court the treble Value is recoverable. As to which two Points have been reſolved, Firſt, That the Owner or Tenant of the Tithes, may ſue for the treble Value in the King's Temporal Court, by Action of Debt. 2 *Cro.* 70. 3 *Cro.* 126, 608. And Secondly, that a Suit for the treble Value may not be brought in the Spiritual Court, 13 *Co.* 23,

and 47; and if the treble Value be there demanded, a Prohibition lies, as aforeſaid. See *Brownl.* 7. and *Godbolt*, The Dean and Canons of *Windſor*'s Caſe.

In Courts of Common Law.

Alſo, when a Sentence definitive was given in the Eccleſiaſtical Court for the treble Value, *&c.* and a Prohibition was thereupon prayed, tho' the Court doubted whether a General, or a Special Prohibition ought to iſſue, and whether the Court Chriſtian, after a Definitive Sentence, could divide their Sentence, or the Execution of it; yet at length it was reſolved, That the Prohibition ſhould be, That they ſhould not proceed to the Execution of their Sentence, as to the treble Value. See *Moor* 873.

Special Prohibition.

And although in the Spiritual Court, upon a Libel grounded on the ſaid Statute 2 & 3 *Ed.* 6. the Sentence be, that the Plaintiff ſhould recover the ſingle Damages, and the ſame be ſet in certain, *& ulterius quod recuperet duplicem valorem*; which is alſo by the ſame Sentence ſet in certain; yet a Prohibition will be granted, becauſe the Damages to be given in that Court are exceeded in the ſaid Sentence; for though in ſuch Sentence it be not expreſly ſaid that treble Damages ſhall be recovered, yet it amounts to as much, if the Words of the Sentence be joined together; wherefore in ſuch Caſe it was directed, That a Special Prohibition, in which the ſaid Statute, and the whole Matter was to be mentioned, ſhould be awarded. See *Godb.* 341.

For Exceſſive Damages.

Note.

And thus, by the Expoſition of the Clauſe of giving treble Damages in the ſaid Statute,

the *Common Law Courts, viz.* King's Bench, Common Pleas, and Exchequer, *have the Trial of Cauſes of Tithes originally, to the great Grief of the Civilians, and no leſs Benefit and Advantage of the Clergy, and other Proprietors of Tithes.*

Not in the Exchequer Chamber (aliter *in the Court of Pleas.*)

However, the treble Value for Tithes not duly ſet forth, not recoverable by Bill in the Exchequer Chamber; and when a Bill was exhibited there on this Statute for the treble Value, it was clearly holden by the Court, That the Bill did not lie upon this Matter; for there ſhall be no Suit or Proceedings according to the Order of that Court, in Caſes of Conſcience upon any Penal Statute. But the ſame may be ſued for in the Court of Pleas there. 3 *Leon.* 204. *Moor* 302.

And yet it is ſaid by *Keeling*, That the treble Value given by this Statute, is a Duty trebled by the Statute, and not a bare Penalty only. 2 *Keb.* 502.

Except for the ſingle Value.

And a Bill being brought in the Exchequer Chamber, and a Demurrer to it, for that the Plaintiff had not thereby demanded the ſingle Value, it being a *Bill of Diſcovery* only to enable the Plaintiff to ſue for and recover the treble Value, the Court overruled the Demurrer, for that Tithes were ſueable for, in that Court, before the Statute; but a *Quære* is made by the Reporter, becauſe, as he ſays, it is contrary to the common Practice and Uſage of the Court, to have ſuch a Bill there, without alledging therein, That the Plaintiff is contented to receive the ſingle Value only. See *Hardr.* 190.

And this I take to be the Practice of the Court of Chancery alſo.

Alſo in an *Engliſh Bill* in the Exchequer Chamber, the Plaintiff is not to ſet forth particularly his Title to the Tithes, no more than in an Action of Debt upon the Statute; as if a Vicar be Plaintiff, he need not ſet forth whether he Claims the Tithes by Preſcription, or by Indowment, eſpecially if the Defendant admits the Plaintiff's Right to have the Tithes, and inſiſts upon ſome other Matter, as Payment, *&c.* For that will ſupply the Defects of the Bill; tho' 'tis ſaid to have been often ruled contrary. See *Hardr.* 130, 321.

And note, in ſuch Caſe the Plaintiff ought to make Proof of the Value of the Tithes, as what Cattle hath been depaſtured in the Place where, *&c. Hardr.* 4.

Privilege not in all Caſes in the Exchequer.

Nor may a Recompence, according to the ſingle Value of the Tithes ſubſtracted, be recovered in all Caſes in the Court of Exchequer. For when the Queſtion was moved there, whether an Impropriator that is to pay an annual Rent to the King for his Impropriation, in the Name of a Tenth, ſhould have the Privilege of that Court to ſue for Tithes there, as the King's Debtor, *viz.* for the ſingle Value thereof? The Barons were of Opinion that he ſhould not. For upon the ſame Reaſon (ſay they) every one, who is to pay any Tenths or Firſt-Fruits, ſhould draw another who ſues him, into the Exchequer, and ſo all Controverſies concerning Tithes and Parſonages ſhould be drawn thither; which would be a great Prejudice to the

the Spiritual Courts. (*Quære* if a good Reaſon? and if the Practice be not now to retain all ſuch Suits there.)

But *Egerton contra* vouched *Conyer*'s Caſe, where the King gave a Parſonage to a Prior in *Frankalmoigne*, and the Tithes thereof being withdrawn, the Prior impleaded him, who withdrew them, in the Exchequer; and in that Caſe it was holden, That the Prior ſhould have the Privilege; for the King is in Danger to loſe his Patronage, or rather his Founderſhip, if the Rectory be Evicted —— *Gent.* Baron ſaid, That the Tenant of the King in Chief, or he who pays Firſt-Fruits, or he who holds of the Queen in Fee-farm, ſhall not have in that Reſpect Privilege. See 2 *Leon.* 146. *Caſes of Tithes in the Exchequer.*

And yet, if a Copyholder of the King's Manor pretends Preſcription for a *Modus Decimandi* againſt a Parſon, the Right of Tithes ſhall be tried in the Exchequer, and a Prohibition was granted in ſuch a Caſe, to the Eccleſiaſtical Court, *Paſ.* 7 *Jac.* 1. 4 *Leon.*

And when the Caſe was that *J. S.* was Parſon of a Church, and *A.* Vicar, and the King Patron, the Court ſaid, That the Debate between the Parſon and the Vicar for the Tithes ought to be either in the Exchequer Chamber by *Engliſh Bill*, or by Action in the Office of Pleas. See 1 *Leon.* 59. and 3 *Leon.* 204.

It is alſo ſaid, That where a Prior is the King's Debtor, or ought to have Tithes of another Spiritual Perſon, he may chooſe to ſue for the Subſtraction of his Tithes, either in the Eccleſiaſtical Court, or in the *Election.*

Exchequer; and yet the Perſons and Matter alſo were Eccleſiaſtical. For ſeeing the Matter by a Mean concerneth the King, he may ſue for them in the Exchequer, as well as in the Eccleſiaſtical Court, and there ſhall the Right of Tithes be determined. 38 *Aſſ. pl.* 20. cited in 5 *Coke de Jure Eccleſiaſtico*, Fol. 16. See other Caſes of Suits for Tithes by Bill in the Exchequer Chamber. *Hardr.* 130, 133, 190, 321, *&c. Vide Degg* 405, *&c.*

In the Chancery. Tithes alſo by *Engliſh Bill* may be ſued for in the Court of Chancery, but not for a Forfeiture of the treble Value. For the Plaintiff in ſuch Bill there, as alſo in the Exchequer Chamber, muſt alledge in his Bill that he is contented to wave the ſaid Forfeiture, and inſiſt only on the ſingle Value.

Of Suits in Chancery touching Tithes, ſee 1 *Chancery Caſes*, 187, 233, 272, 282. 2 *Chancery Caſes*, 32, 237. 1 *Vern.* 60, 185. 2 *Vern.* 46. *New Caſes in Equity* 17. *Curſus Cancellariæ* 40. 1 *Chan. Rep.* 25 & 27.

It is true, in 4 *Car.* 1. a Bill in Chancery for maintaining a *Modus Decimandi* was diſmiſs'd, as being a Matter proper for the Common Law or the Eccleſiaſtical Court. 1 *Chan. R.* 27. But divers Precedents were before that Time of the like Bills retained and decreed in that Court. (*Vide ibid.* 25.) And it is now become an eſtabliſhed Practice.

County and Sheriffs Courts. And, as I have before obſerved, That Tithes originally were ſued for in the Hundred or County Courts; ſo ſome have held, that even at this Day they may be ſued for by

by Action of Debt on the ſaid Stat. 2 & 3 *Ed.* 6. in the Sheriff's Court, by *Juſticies*, &c. See 2 *Keb.* 416, 420. 1 *Lev.* 253. *Biſhop* v. *Corbet*, in *B. R.* which Caſe, as reported by *Lewins*, was thus:

Quære if Debt for Tithes lies in the County Court.

A Prohibition was prayed to the County Court to ſtay a Suit there, in an Action of Debt for Tithes by *Juſticies*; for that it was not *Debitum ex contractu*, but *ex delicto*, founded on a Statute, whereof the Sheriff had no Power to hold Plea. And the *Juſticies* does not enlarge his Juriſdiction to other Actions, but only enables him to hold Plea of greater Sums than he can by his ordinary Juriſdiction; and it was further moved, that a Prohibition was grantable in this Caſe without a Suggeſtion entred, becauſe it is in Nature of a *Superſedeas*; which the Court denied; but they held this a Caſe very fit to be conſidered, and therefore directed a Suggeſtion to be, and a Declaration thereon, and that the Defendant ſhould plead or demur thereto, ſo that the Caſe might come judicially before the Court.

No Prohibition to inferior Courts without a Suggeſtion.

But note, as to the firſt Objection, tho' it might be *Debitum ex delicto* by the Statute, yet it might be *Debitum ex contractu* at Common Law, and conſequently that the Action lies in the County Court by *Juſticies*; for the Statute does not take away any Remedy that the Common Law gave.

Mayor's Court by Cuſtom. Houſes Tithe-free.

Alſo by the Cuſtom of ſome antient Cities and Towns, Tithes of Houſes, &c. ariſing within thoſe Places may be ſued for in the *Mayor's Court*, as in *London*, where the Tithes are generally computed at ſo much a Houſe

Houſe *per Annum*; and the like Cuſtom I take to be in *Canterbury*, *York*, and other Cities. But note, the Tithes payable by ſuch Cuſtom, may not properly be called Tithes of the Houſes, for Houſes in themſelves are Tithe-free. But ſuch Payments do ſuppoſe a *Modus*, or antient Compoſition, in Lieu of the Land whereon the Houſe is built.

Juſtices of the Peace. Small Tithes.

And now by the ſeveral Statutes of 7 & 8 *W.* 3. *c.* 6. and 1 *Geo.* 1. *c.* 6. (which ſee hereafter) a Juriſdiction is given to two Juſtices of the Peace (not Patrons or intereſted) and on Appeal to the Quarter-Seſſions, to hear and determine Caſes of ſmall Tithes under 40 *s. per Annum.* See *Degg* 414.

A Modus, *Cuſtom, or Preſcription, to be tried at Law.*

But even in that Caſe, if the Perſon complained of for with-holding his Tithes, *&c.* ſhall before the Juſtices inſiſt upon a Preſcription, *Modus Decimandi*, Cuſtom, *&c.* it ſhall be determined by a Trial at Law. See the ſaid Act 7 & 8 *W.* 3. *poſt.*

Actions on the Stat. 2 & 3 Ed. 6. c. 13.

As to Actions brought on the Statute 2 & 3 *Ed.* 6. for not ſetting out or with-holding, detaining or obſtructing of the Tithes, *&c.* we may obſerve, That in *Wood*'s Caſe before-mentioned (*viz.* an Information in the Exchequer for the treble Value, as forfeited to the Queen) it was reſolved That an Action of Debt lay in any of the Courts of Common Law, upon the ſaid Statute, for not ſetting forth of Tithes, *&c.*

Debt for not ſetting forth Tithes.

Since which Reſolution, Actions of Debt have been frequently brought in all the Courts of *Weſtminſter* by Parſons, Vicars, Proprietors, Owners and Farmers of Tithes, as

as well Laymen as Spiritual; but it being ſo long (*viz.* forty Years after the making of the Statute) before it was put in Practice, the Statute in the Declaration was uſually miſrecited, *viz.* That on the fourth Day of *November* 2 *Ed.* 6. it was Enacted, *&c.* Whereas in Truth the Parliament commenced 4*to Novembris* (*Degg* ſays *Februarii*) *Anno* 1 *Ed.* 6. and was continued by Prorogation to the 4th of *November* 2 *Ed.* 6. And this Miſtake being diſcovered in the Caſe of *Oliver* v. *Collins*, (1 *Brownl.* 100.) in *B. R. Paſ.* 6. *Jac.* 1. it was moved in Arreſt of Judgment, but over-ruled after great Debate, by Reaſon of the Multitude of Precedents in the ſame Form. And thereupon they affirmed *Quod multitudo Errantium parit Errori Patrocinium.* See 1 *Brownl.* 100. *Dyer* 171. *Telv.* 126. *Stile* 122. 2 *Keb.* 327.

A Miſtake in reciting the Act.

And yet Note, where the Plaintiff in his Declaration recited this Statute to be made of the 4th of *November Anno* 2 *&* 3 *Ed.* 6. after Verdict Judgment was arreſted, becauſe the ſame Day could not be in two Years of the ſaid King; ſee *Moor* 302. *Langley* v. *Haines.*

Note.

And here it may be proper to ſhew, by and againſt whom Actions lie on the ſaid Statute, as alſo ſuch Caſes as have been adjudged, as to Declarations, Pleadings, Iſſues, Evidence, Verdicts and Judgments thereon.

By and againſt whom Actions lye on this Statute.

If a Husband be ſeized or poſſeſſed of Tithes, in Right of his Wife, or jointly with his Wife, it is commonly held they muſt both join in bringing an Action for Sub-

By Husband and Wife.

Subſtraction of Tithes, upon this Statute. See *Moor* 912. 2 *Inſt.* 650. 13 *Co.* 48. *Noy* 136. 2 *Brownl.* 9. But yet in one *Babbington's* Caſe, 1 *Roll. Rep.* 13. it ſeems to be admitted, That the Action may be brought by the Husband alone, without joining the Wife with him; which I conceive to be conſonant to Law and Reaſon.

By the Wife if the Huſband dies.

If the Husband dies, the Wife, and not the Executors of the Husband, ſhall bring the Action, *Noy* 136. But if the Tithes be once ſet out, and ſevered from the nine Parts, they then become a Chattle veſted in the Husband, (and it ſeems ſhall go to his Executors) *Ley* 70. And therefore if after ſuch Severance they be taken by a Stranger, the Husband alone may bring an Action of *Treſpaſs* for taking away his Tithes. See *Jon.* 325. *Noy* 136. 2 *Brownl.* 9.

Treſpaſs.

But an Action of Treſpaſs, in ſuch Caſe, lies not againſt the Owner who ſet out the Tithes, *Noy* 44. *Moor* 912. 3 *Cro.* 606. nor may any other Action be brought againſt him (except he be *particeps criminis*) and if it be, he may plead the Special Matter in Bar of ſuch Action. 4 *Leon.* 7.

But if after the Severance the Owner of the Corn himſelf, or any other, by his Command takes the Tithes away, the Husband and Wife, in ſuch Caſe, may join in an Action on the ſaid Statute againſt the Owner for not ſetting out the Tithes, notwithſtanding they were ſevered from the nine Parts, for that ſuch Severance is to be look'd on as fraudulent, only to evade the Law. *Noy* 136.

But

But it ſeems to me, That the Husband in this Caſe has an Election, either to charge the Owner of the Corn in an Action of Treſpaſs at the Common Law, to be brought by himſelf alone, for taking away his Tithes after they were ſevered; or in an Action on the Statute, to be brought by himſelf and his Wife, for taking away the Corn, the Tithes not being ſet out; even as before the Statute, in ſuch a Caſe, the Party grieved might either have had Treſpaſs at Common Law, or ſu'd for the Tithes in the Spiritual Court: Yet *Quære* if there be not a Difference, where the Tithes are immediately taken away by the Owner of the Corn, after they are ſevered, and where they are ſuffered to continue ſome Time upon the Land after ſuch Severance; for in the later Caſe it ſeems they may be taken or diſtrained Damage-feaſant.

Where one is poſſeſſed by ſeveral Titles, one Action.

If one be poſſeſſed of Tithes by ſeveral Titles, as where Part of them belongs to the Parſon, and Part to the Vicar, who ſeverally make Leaſes of their ſeveral Parts to one Perſon; ſuch Leſſee may bring one Action for the Subſtraction of theſe Tithes. 2 *Cro.* 68. *Noy* 63. and 1 *Brownl.* 86. *S. C.* And ſo if the Lands out of which the Tithes are demanded, lie in ſeveral Pariſhes, yet one Action may be brought for the Subſtracting of them; and the Plaintiff need not ſet forth how much of the Lands lie in one Pariſh, and how much in the other; the Action being in Nature of an Action of Treſpaſs grounded upon the Wrong, in not obſerving the ſaid Statute. See 1 *Ventr.* 126. 2 *Keb.* 765. and 2 *Lev.* 2. S. C. And

Declaration. And yet, if the Plaintiff in his Declaration only ſays, That the Tithes belonged to him, and ſets not forth in what Pariſh the Lands lie, out of which the Tithes are demanded, this is nought, if the Defendant demur to the Declaration; but if it go to Trial, and a Verdict be found for the Plaintiff, this Omiſſion is help'd by the Verdict; by *Rolls*, *Stile* 229. *Cane* and *Pell*'s Caſe.

But ſee the Caſe of *Strode* v. *Byrt*, *Paſch.* 7 *W.* 3. *B. R.* where in Debt on the Stat. of *Ed.* 6. for not ſetting out of Tithes it was held, That it is ſufficient for the Plaintiff to declare he was *Proprietarius*, without ſhewing any Title; but it was ſaid he cannot recover without proving his Title. 4 *Mod.* 422. *Cumberb.* 238. S. C. *vide poſt.*.

Where ſeveral may join in the Action. Two ſeveral Perſons, who have Right to Tithes by ſeveral Titles, cannot join in one Action for their Subſtraction; as the Parſon and Vicar in the Caſe *ſupra* cannot join, becauſe they have ſeveral Titles (tho' their Leſſee might, becauſe he has but one Title.) 1 *Brownl.* 86.

By Joint-Tenants, or Tenants in common. It is ſaid that Joint-Tenants, or Tenants in Common of Tithes, muſt join in an Action for their Subſtraction. *Clayton*'s *Rep.* Caſe 48. Yet *Quære* as to Tenants in common: For it ſeems contrary to the Reſolution in the Caſe before cited, *viz.* 1 *Brownlow* 86.

How againſt them. Where there are two Joint-Tenants, and they enter and occupy jointly, the Action muſt be brought againſt them jointly; but if one only enters and occupies, the Action muſt be brought againſt him that occupies alone.

alone. See *Hutton* 121, 122. See 2 *Cro.* 86. 362. and *Hughs's Abr.* 687.

And note; an Action upon this Statute lies by Executors, but not againſt them. See *Hutton* 121, 122. *Executors.*

If the Action be brought by a Parſon by Plaint, he need not name himſelf Parſon in the *Queritur*. For if it appear by the Declaration that he is Parſon, it is ſufficient. But it is ſaid by *Fleming*, Juſtice, That if the Action be brought by Writ, (*i. e.* by original) he muſt name himſelf Parſon, altho' he need not do ſo, when it is by Plaint. 1 *Brownl.* 98. *Form of the Declaration.*

It has been held, That if the Action be brought *Tam pro Domino Rege quam pro ſeipſo*, that it is not good. 3 *Cro.* 621. and *Moor* 911. S. C. And yet it is agreed in *Luvered* and *Owen's* Caſe, *Hetl.* 121, 122. That an Action, *Tam pro Domino Rege quam pro ſeipſo* may be brought on this Statute, becauſe the King is to have a Fine. And Sir *S. Degg*, *p.* 404. takes this Caſe to be Law, rather than the Caſe in 3 *Cro.* and *Moor ſupra*, upon that Account only, that the King is to have a Fine, if Judgment be againſt the Defendant; and mentions Actions brought on the Statute of *Hue and Cry*, as within the ſame Reaſon. Tam, &c. quam, &c.

But in Anſwer to this it is ſaid, That the King's having a Fine is no Reaſon for bringing the Action in the King's Name; for in many Actions the King has a Fine, and yet the Action is never brought in his Name. And therefore in this Caſe it is thought more proper to bring the Action in the Name of the

the Party only. But it is admitted in *Moor* 911. That an Information in the King's Name will lie upon this Statute, for not ſetting out of Tithes; and accordingly in *Eaſter* Term 26 *Eliz.* ſuch an Information was brought. See *Savil* 62. and *Wood's* Caſe *ante.*

Information

againſt the Vendor or Vendee.

If the Owner of the Land ſells the Corn thereon growing, and the Vendor by Command of the Vendee, (*Quære* if not the Vendee by Command of the Vendor) reaps the Corn and carries it away without ſetting out the Tithes, the Action lies againſt the Owner of the Land. *Noy* 152. 1 *Brownl.* 34. And ſome ſay the Action may be againſt the Vendee at the Election of the Plaintiff. See *Watſon* 634.

Owner of the Corn.

It is not neceſſary to ſet forth in the Declaration by whom the Corn was ſown, the Action being brought againſt him who is Owner of the Corn at the Time of Reaping;

Time and Place to be ſhewn.

but the Time and Place where and when the Corn was carried away muſt be alledged. 2 *Cro.* 362. And although the Severance of the Corn be ſhewed to be before the ſowing thereof, yet becauſe the mentioning the Time when the Corn was ſown, is ſuperfluous and unneceſſary, the Declaration is good notwithſtanding. See *Degg, p.* 398. where is cited the Caſe of *Pellet* ver. *Hemworth. Paſch.* 1657. *B. R.*

Not the Plaintiff's Intereſt.

So if the taking away the Corn is alledg'd to be after the Defendant's Intereſt in the Land is determined, yet it is good; for he continues to be Owner of the Corn, notwithſtanding his Intereſt in the Land be determined

mined before (after) it be ſevered. 2 *Cro.* 325. and 1 *Brownl.* 123. *S. C.*

It is not neceſſary for the Plaintiff in his Declaration to make any Special Title to the Tithes, or to ſhew any Deed to maintain his Right to them; for the Action is but in Nature of Treſpaſs to recover Damages, and to puniſh the Wrong and Injury the Plaintiff has ſuſtained by taking away his Tithes contrary to the Statute; and the Plaintiff's Title is only as an Inducement or Conveyance to the Action; but it is ſufficient to purſue the Words of the Statute, and ſet forth in the Declaration, That the Defendant is Owner or Proprietor of the Tithes. See 1 *Roll. R.* 13. and 1 *Ventr.* 126. and ſo in the Caſe of *Strode* and *Byrt*, *Paſ.* 7 *W.* 3. in *B. R.* before-mentioned, it was reſolved, It is ſufficient to declare *ut Proprietarius*, without ſhewing a Title; but he cannot recover without proving a Title: Nor is it neceſſary for the Plaintiff to ſhew what Eſtate the Defendant hath in the Land, or by what Right or Title he occupies it; but to ſay generally that the Defendant is Occupier, is ſufficient. See *March* 21.

Or Title.

Nor the Defendant's Eſtate.

Nor need the Plaintiff expreſs in the Declaration the Quantities or Loads of Corn, &c. that were carried away, 1 *Brownl.* 72. nor the Kinds of it. 2 *Inſt.* 650. 13 *Coke* 47. 3 *Keb.* 307. —But in an *Ejectione firmæ* brought for Tithes, there the ſeveral Kinds ought to be ſet forth. 11 *Co.* 25. *b.*

Nor the Quantities, &c.

In a Declaration on this Statute the Plaintiff ſet forth, That he was *Proprietarius Decimarum Garbarum & Fœni, &c.* andthat the

Defendant did ſow certain Lands containing ſo many Acres in that Pariſh with Grain, and carried the ſame away, not ſetting out the Tithes; and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That *Proprietarius Decimarum Garbarum* was uncertain, and no Grain in particular was demanded by the Declaration, and therefore it was not good.

Garba quid.

But it was reſolved, That *Garba* in its proper Signification is intended of Corn: And *Roll* ſaid it had been ſo adjudged in one *Baxter*'s Caſe, upon Conſultation had with the Civilians; where, upon a Grant of *Decimas Garbarum*, the Party claimed to have Tithe Hay; but agreed, That although the Word *Garba* in its larger Latitude did comprehend any Thing that uſed to be bundled up, as Wood, *&c.* yet after a Verdict it ſhall be intended of Corn only; and tho' the Demand was of ſo many Acres of Grain generally, yet it was held to be certain enough, it being mentioned to be ſown on a certain Number of Acres; this Action on the Statute not being brought to recover the Tithes themſelves, but Damages for them only; and it was alſo agreed by *Roll*, &c. that the Word *Grain*, by common Conſtruction, ſhall be intended Corn, and not other Seeds not Tithable. See *Allen* 80. *Stile* 103, 108, 237, 238. And *Hill.* 40 *Eliz.* it was reſolved, That the general Allegation, that the Defendant *Grano ſeminavit* 20 *Acras Terræ*, *&c.* without ſhewing what Kind of Grain, was good. 2 *Inſt.* 650. *Coke*'s *Entr.* 162.

Good after a Verdict.

Grain quid.

And note; it is ſaid to be the beſt way in Actions brought upon this Statute, to declare generally, That the Plaintiff is Parſon, &c. of ſuch a Pariſh, and that the Defendant had ſuch Tithes within that Pariſh, the ſingle Value whereof is ſo much, which he took and carried away, &c. whereby the Action accrues to the Plaintiff, according to the Form of the Statute. See 1 *Sid.* 265. 1 *Keb.* 922. *Beſt to declare generally.*

Note alſo, That the Plaintiff need not ſet forth, That he, or the Defendant is *ſubditus Domini Regis* (although the Words of the Statute extend only to Subjects) for it ſhall be ſo intended, 1 *Sid.* 265. 1 *Keb.* 922. nor need the Plaintiff ſhew, That the Tithes were not compounded for before the Corn carried away; for that lies on the Defendant's Part to be made out. 2 *Keb.* 34. But ſee *Cumberba.* 283. where it is held in *B. R.* That if it is not alledged in the Declaration, That the Defendant had not agreed with the Parſon, it is ill on a Demurrer, but good after a Verdict. *Vide ibid.* and 4 *Mod.* 422. *What Declarations are good or not.*

Where the Plaintiff, in an Action on this Statute, for not ſetting out the Tithe of Wood, declared, That the Defendant had cut down Wood to the Value of 200 *l.* and demanded 600 *l.* as the treble Value of the Tithes of the ſaid Wood; this was adjudg'd not good; for that the Plaintiff of his own ſhewing, demanded more for Tithe than the whole Wood was worth. See 1 *Brownl.* 94.

Yet where the Plaintiff declared, That the Defendant was Occupier of twenty Acres of Land, *quas quidem pred' thirty Acres* he did

ſow, and carried the Corn away without ſetting out the Tithes, there the Word *Thirty* was held to be void; and that the Declaration was to be underſtood of the ſame twenty Acres, which before he was ſaid to be Occupier of. 1 *Lev.* 97.

This Action not within the Statute of Limitations.

Alſo this Action is held not to be within the Statute of Limitations, that Statute not extending to Actions grounded on Acts of Parliament; and therefore the Plaintiff is not confined to ſix Years, or any other Time certain, within which to bring his Action. See 1 *Cro.* 513. 1 *Sand.* 38. 1 *Sid.* 305, 415. 1 *Keb.* 93. 2 *Keb.* 462, 497. 2 *Sand.* 66.

Pleas to Actions on this Statute.

As to *Pleas* to Actions brought upon this Statute we may obſerve, That the Declaration thereon being uſually a Demand of a Debt, or Duty due from the Defendant to the Plaintiff, and veſted in him by the ſaid Statute, in Satisfaction of, or Recompence for Tithes ſubſtracted, the moſt common and uſual Plea is *Nil Debet*, which is a direct Anſwer to, and a Denial of the Plaintiff's Demand.

Nil Debet.

Non Cul.

But the Plea of *Non culpabibis*, or Not guilty, is alſo held to be a good Plea in this Action, That being a Denial of the Offence, or Breach of the Law, charged on the Defendant, in not ſetting out the Tithes according to the Statute; which Offence is the Ground of the Plaintiff's Demand. See *Hob.* 218. 3 *Cro.* 766, 621. *Moor* 302, and 914. and both theſe Pleas are the General Iſſue in this Action.

General.

Special.

But we find alſo, That Defendants do ſometimes plead Special Pleas, as a *Modus*, or

or other Diſcharge; and the ſame are held good, as the Caſes in *Allein* 80. and in *Raymond* 14. and 1 *Keb.* 5. *S. C.* where a Parol Diſcharge of Tithes for Years was pleaded; and ſo is 1 *Lev.* 24. and ſee the Caſe of a Compoſition *quamdiu ambobus partibus placuerit*, 1 *Salk.* 144. but note, ſuch an Agreement is determined by bringing the Action, and therefore cannot be pleaded.

General Iſſue.

Neither is it uſual to plead ſuch Special Pleas, nor ſo ſafe as the General Iſſue, wherein any Diſcharge of Tithes may be given in Evidence. And it may alſo be queried, whether on a Special Demurrer for that Cauſe, ſuch Special Pleas are good, as amounting only to the General Iſſue.

Evidence.

As to *Evidence* to be given in this Action, theſe two Points are to be obſerved, *viz.*

1. What Evidence is requiſite to be given by the Plaintiff to maintain his Action, ſo as to obtain a Verdict. And,

2. What Evidence the Defendant may, or ought to give, to excuſe or juſtify himſelf from the Penalty of the Statute.

Evidence by a Parſon, &c. Plaintiff, to prove his Inſtitution and Induction.

Firſt, If the Plaintiff be a Parſon, Vicar, or other Eccleſiaſtical Perſon, and claims the Tithes in Right of the Church or Benefice whereof he is Incumbent, he is in Strictneſs bound to prove his Inſtitution and Induction, and all Things elſe required by Law to qualify himſelf to be Incumbent of that Church to which the Tithes do belong.

But if the Plaintiff hath been for ſeveral Years in Poſſeſſion, he is not ordinarily put to prove theſe Matters, unleſs the Defendant in his Defence ſhews ſome Reaſons

why theſe Things ought to be proved and made out.

But the Law doth not Determine how many Years the Plaintiff ought to be in the Poſſeſſion of his Benefice to excuſe him from being put to the Proof of theſe Things; but that ſeems to be left to the Diſcretion of the Judge who tries the Cauſe. Tho' I conceive a ſmall Number of Years, as three or four, quiet Poſſeſſion, will be ſufficient.

Negative to be proved.

In a Suit for Tithes brought in the Spiritual Court, the Defendant pleaded, That the Plaintiff being Parſon, had not read the Thirty-nine Articles; and the Court put the Defendant to prove that Matter, although it was a Negative; whereupon he moved for a Prohibition, which was denied: For by *Coke* and *Dodderidge*, the Law doth preſume that a Parſon has read the Articles, becauſe otherwiſe he is to loſe his Benefice. And *when the Law preſumes the Affirmative, then the Negative is to be proved.* 1 Roll. Rep. 83.

Reading the Thirty nine Articles.

And ſo it is ſaid to have been ruled upon Evidence at the Aſſiſes, That all Things requiſite to make the Defendant compleat Incumbent ſhall be preſumed, unleſs the Defendant, by ſome Evidence to the contrary, give Occaſion to the Plaintiff to prove thoſe Matters. See *Clayton's Rep.* 83.

Yet in Ejectment for a Rectory, it was inſiſted on by the Defendant's Counſel (after the Plaintiff had made Proof of his Admiſſion, Inſtitution and Induction) That the Plaintiff ought to prove his reading and ſubſcribing the Thirty-nine Articles, and the Declaration of his Aſſent to all Things contained

tained in the Book of Common Prayer, and that ſuch Declaration of his Aſſent was made within the Time appointed by the Statute; and by the Report of the Caſe, the Opinion of the Court ſeemed to be, That all theſe Things ought to be proved: But it is there ſaid, That Admiſſion, Inſtitution and Induction upon the Preſentation of an Eſtranger, is ſufficient Evidence to bar the Plaintiff in an *Ejectione Firmæ*, and to put him to his *Quare Impedit*. See 1 *Sid.* 220.

But according to the Opinion of *Coke* and *Dodderidge*, *ſupra*: For that the Plaintiff has once a legal Title by Inſtitution and Induction, the other Matters appointed by the Statute to be afterwards performed by him, the Omiſſion of any of them, altho' it make the Living void, yet being as a Condition ſubſequent to the Plaintiff's Title, ſhall be preſumed to be performed by him; and therefore the *Non-performance* ought to be made out and proved by the Defendant.

Alſo the Plaintiff muſt prove, that the Lands lie within his Pariſh, and that the Corn, &c. growing thereon was carried away; and he muſt alſo prove the Value of the Corn, &c. and if the Plaintiff be a Leſſee, muſt prove his Leaſe; but after a long Poſſeſſion he need not prove his Leaſe; nor need he prove what Eſtate his Leſſor had at the Time of the Leaſe made. 1 *Sid.* 220. and where he muſt prove his Title, *vide ante Strode* v. *Byrt*. *That the Lands lie in the Pariſh*, &c.

The Plaintiff having made out his Caſe, and prov'd his Title to the Tithes, it is then Incumbent on the Defendant to juſtify or excuſe *Defendant's Proof of ſetting out the Tithes*, &c.

excuſe himſelf. In order to which he muſt prove, That the Tithes were juſtly ſet out according to Law, and the Cuſtom of Tithing uſed within that Pariſh. And if the Tithes be once ſo duly ſet out, and after that taken away by a Stranger, without Fraud in the Defendant, *&c.* the Defendant, (or Owner of the Land) ſhall not be chargeable.

Agreement, &c. by Parol, &c.

So the Defendant may prove an *Agreement or Compoſition* made with the Plaintiff for the Tithes, and tho' it be a Parol Agreement only, which by Law is not ſufficient to grant the Intereſt of the Tithes, eſpecially for more Years than one; yet ſuch a Parol Agreement is held good to excuſe the Defendant from the Forfeiture given by the Statute. See *Raym.* 14. 1 *Keb.* 21. 1 *Lev.* 24. 3 *Keb.* 24.

And if there be two Plaintiffs who bring the Action, an Agreement with one of them only, is ſufficient, and ſhall bind his Companion. *Moor* 915. Alſo the Defendant may prove, That another Perſon hath the Right to the Tithes, to whom he has paid them or compounded for them.

Another has Right.

Simony.

The Defendant may alſo prove, That the Plaintiff obtain'd his Living by Simony, or did not read the Articles, *&c.* or is Guilty of ſome other Act or Omiſſion, which makes his Benefice void; or he may prove a Leaſe or Grant, or other Title from the Plaintiff, or from ſome other Perſon, from or under whom the Plaintiff claims, who had a Right to Leaſe or Grant ſuch Tithes; and as it ſeems, the Defendant may prove, that the Benefice is above 8*l.* *per Annum* Value, and that the Plaintiff hath accepted another Living without Diſpen-

Diſpenſation, contrary to the Stat. 21 *H.* 8. *c.* 13. 1 *Cro.* 357.

So may the Defendant prove a *Modus Decimandi*, or any other Diſcharge of the Tithes, or the Payment of them, according to ſome ſpecial Cuſtom, Preſcription, Privilege, Unity, *&c.* And a Nonpayment of Tithes, Time out of Memory, is a good Evidence of ſuch Diſcharge. *Hob.* 300, 311. *Savil* 62. 3 *Keb.* 217. *Dyer* 349. *Degg* 338. *Modus Decimandi, Cuſtom, Preſcription, &c.*

But if the Diſcharge be by the Pope's Bull or Compoſition, a Copy of ſuch Bull or Compoſition is not Evidence without ſhewing the Bull or Compoſition it ſelf. *Winch* 70. *Pope's Bull, Compoſitions,*

So Depoſitions in the Eccleſiaſtical Court in a Suit there for Tithes (although the Witneſſes be dead) are not Evidence in an Action brought at Common Law, though in the ſame Cauſe. But a Sentence in the Eccleſiaſtical Court being a Judicial Act, it is ſaid may be given in Evidence in a Suit in the Temporal Courts. *March* 820. 2 *Roll. Abr.* 679. *Quære* if in another Cauſe? *Depoſitions,* *Sentence.*

As to *Verdicts*, we may obſerve, If the Jury give a Verdict for the Plaintiff, they muſt find the real Value of the Tithes, which ſhall be trebled by the Court; as if the Jury find the real and ſingle Value to be 20 *l. &c.* they ought to give the Plaintiff only ſo much, and the Court ſhall treble it, and make the Sum ſo given 60 *l.* and ſo it was done in *Baldwin's* Caſe. *Godb.* 341. *Verdict* pro Quer. *where Jury muſt find the Value.*

But if the Iſſue be upon the Cuſtom of Tithing, or any other collateral Point, the Jury then need not find any Value of the Tithes,

Tithes, for in ſuch a Caſe the Defendant ſhall pay (only) the Value expreſſed by the Plaintiff in his Declaration, becauſe by the collateral Matter pleaded in Bar, the Value of the Tithes ſet forth in the Declaration is confeſſed. See 1 *Brownl.* 100. *Yelv.* 127.

Proteſtation of the Value. And therefore, in all Actions brought upon this Statute, if the Defendant plead any collateral Matter in Bar of the Action, he muſt take the Value of the Tithes mentioned in the Declaration by Proteſtation, *viz.* he muſt by Proteſtation ſay, That the Tithes were not of that Value as is declar'd, otherwiſe he will be charg'd with the Value which the Plaintiff hath, by his Declaration, ſet upon them. See *Allein* 88. 1 *Keb.* 706.

Judgment. And by *Jones*, Juſtice, the ſame Law is, if Judgment be given for the Plaintiff by *nihil dicit*, *non ſum informatus*, or upon Demurrer; for in theſe Caſes the Plaintiff ſhall have Judgment for the whole Value by him demanded. See *Degg* 410.

No Damages or Coſts. But the Plaintiff in Actions on this Statute, ſhall not recover any other Damages or Coſts, but only the treble Value of the Tithes. *Moor* 915. 2 *Cro.* 70. and *Jenkins* 316.

Regula. For it is a Rule, *Where a Statute gives a certain Penalty, there in an Action to recover that Penalty, Damages and Coſts ſhall alſo be recovered; but where no certain Penalty is given,* (as by this Statute for not ſetting out of of Tithes) *there it is otherwiſe.* See 3 *Levins* 374.

Action againſt two, and one is acquitted. If the Action be againſt two or more Defendants, and the Verdict is found againſt one Defendant only, and acquits the reſt; yet

yet the Plaintiff ſhall have Judgment againſt him, againſt whom the Verdict was found; the Action being grounded on a Statute: Altho' it be otherwiſe in Actions grounded upon Joint Contracts at Common Law; by *Roll*, Ch. Juſt. *Stile* 317, 318.

But if the Action be brought for Predial Tithes, for which an Action lies upon the Statute; and alſo for ſmall or other Tithes, for which no Action lies upon the Statute; and the Plaintiff obtains a Verdict for the whole, yet he ſhall not have Judgment upon ſhewing this Matter in the Court: For that the Plaintiff ought not to recover in an Action upon this Statute, but for Predial Tithes only. See 1 *Brownl.* 65 and 70.

Alſo in Actions on this Statute, if Judgment be for the Plaintiff, it ſhall be entred *Quod Defendens ſit in Miſericordia*, and not *Quod capiatur*; becauſe the Action is to recover a Debt given by the Statute, as a Recompence for the Tithes. 1 *Sid.* 233. 1 *Roll. Abr.* 223. (*But ſee now the Statute for Amendment of the Law.*)

And a Recovery in an Action on this Statute is a good Plea in Bar to any other Suit brought afterwards for the ſame Tithes. 1 *Brownl.* 87. *Yelv.* 63.

Proviſion for Recovery of Perſonal Tithes.

Thus we have led the Reader through the whole Method of Ordinary Proceedings at Common Law, as to Actions founded on the ſaid Statute; but as thoſe Proceedings relate to the Subſtraction, Detaining, &c. of Predial Tithes only, as before is obſerv'd, we are in the next Place to conſider what Remedy is provided by Statute Law, for the Recovery of Perſonal Tithes. And

By Stat. 2 & 3 Ed. 6. c. 13.

And firſt, we may obſerve that the before mentioned Statute of 2 & 3 *Ed.* 6. has (as to Perſonal Tithes) *Enacted*, &c. *That if any Perſon refuſe to pay his Perſonal Tithes in Form aforeſaid* (having Relation to the foregoing Clauſe) *then it ſhall be lawful to the Ordinary of the ſame Dioceſe, where the Party that ſo ought to pay the ſaid Tithes is dwelling, to call the ſame Party before him, and by his Diſcretion to examine him by all lawful and reaſonable Means, other than by the Parties own corporal Oath, concerning the true Payment of the ſaid Perſonal Tithes.*

But this Statute being found ineffectual for the Purpoſes intended, a better Proviſion for the Recovery of ſmall Tithes, &c. was at length provided by the Statute of 7 & 8 *W.* 3. *c.* 6. whereby a Power is given to Juſtices of Peace to determine in Caſes of ſmall Tithes, as follows, *viz.*

Stat. 7 & 8 W. 3. c. 6. *For Recovery of ſmall Tithes not above* 40 s. per Ann. *To be paid according to Cuſtom.*

For the more eaſy and effectual Recovery of ſmall Tithes, and the Value of them where the ſame ſhall be unduly ſubſtracted and detained, where the ſame do not amount to above the yearly Value of 40 s. *from any one Perſon*, It is enacted, ‘ That all Perſons ſhall well ‘ and truly ſet out and pay all and ſingular ‘ ſmall Tithes, and Compoſitions and A- ‘ greements for the ſame; and all Offerings, ‘ Oblations and Obventions to the Rectors, ‘ Vicars, or other Perſons to whom they ‘ ſhall be due, in the ſeveral Pariſhes in ‘ *England*, *Wales* and *Berwick*, according to ‘ the Rights, Cuſtoms and Preſcriptions ‘ commonly uſed in the ſaid Pariſhes re- ‘ ſpectively.

'And if any Perſon ſhall ſubſtract, with- *On Complaint, two Juſtices,*
'draw, or any Ways fail in the true Pay-
'ment of ſuch ſmall Tithes, Offerings, Ob-
'lations, Obventions for twenty Days after
'a Demand thereof, then the Perſon to
'whom they are due may make his Com-
'plaint in Writing, to two or more Juſtices
'of the Peace in that County, City, Place
'or Diviſion, where the ſame grows due;
'neither of which Juſtices is to be Patron *not Patrons,*
'of the Church where the ſaid Tithes, &c.
'ariſe, nor any Way intereſted in the ſaid
'Tithes, &c.

'And on ſuch Complaint ſo made to two
'or more Juſtices of the Peace, as aforeſaid,
'the ſaid Juſtices are to ſummon, in Writing,
'under their Hands and Seals, by reaſonable
'Warning, the Perſon or Perſons againſt
'whom ſuch Complaint ſhall be made; and
'after Appearance or Default, the Summons
'being proved upon Oath, the ſaid Juſtices *may hear and determine.*
'or any two of them ſhall proceed to exa-
'mine and determine the ſaid Complaint,
'and upon Proofs and Evidence produced
'before them, ſhall in Writing, under their
'Hands and Seals, adjudge the Caſe,
'and give ſuch reaſonable Allowance for
'ſuch Tithes, &c. ſo ſubſtracted or with-
'held, and alſo ſuch Coſts, not exceeding
'10*s.* as they ſhall judge juſt and reaſon-
'able.

'And if any Perſon ſhall refuſe or neglect, *On Non-payment.*
'by the Space of ten Days after Notice, to
'pay the Sum ſo adjudged, the Conſtables
'and Church-Wardens of the ſaid Pariſh,
'or one of them, ſhall by Warrant, under
the

Diſtreſs and Sale. ‘ the Hands and Seals of the ſaid Juſtices, ‘ Diſtrein the Goods and Chattles of the ‘ Party ſo refuſing, and, after detaining them ‘ for the Space of three Days, in Caſe the ‘ Sum adjudg'd be not paid with reaſonable ‘ Charges for making the Diſtreſs, make ‘ publick Sale of the ſame, pay the Sum ad- ‘ judg'd to the Party complaining, and re- ‘ tain reaſonable Charges for diſtraining, as ‘ the ſaid Juſtice ſhall think fit, and return ‘ the Overplus, if any be.

Oaths. ‘ That the Juſtices, in their Examination ‘ of Matters on this Act, may Adminiſter ‘ an Oath or Oaths.

‘ That this Act is not to extend to Tithes,

London. ‘ *&c.* within the City of *London*, or Liberties ‘ thereof, or to any other City or Town where ‘ the ſame are ſettled by Act of Parliament.

Limitation. ‘ That no Complaint to Juſtices of Peace ‘ for Tithes, *&c.* (on this Act) ſhall be ‘ heard and determined by them, unleſs ‘ made within two Years after the Tithes ‘ *&c.* become due.

Appeal. ‘ That Parties aggrieved by any Judg- ‘ ment of two Juſtices, may appeal to the ‘ next Quarter-Seſſions, and the Juſtices ‘ there preſent, or Major Part of them, ‘ ſhall finally hear and determine the Mat- ‘ ter; and if they find Cauſe to confirm the ‘ Judgment given by the ſaid two Juſtices, ‘ they ſhall degree the ſame by Order of ‘ Seſſions, and give Coſts againſt the Appel-

And Coſts. ‘ lant to be levy'd by Diſtreſs and Sale of ‘ his Goods and Chattles. And,

No removal. ‘ That no Proceedings, by Virtue of this ‘ Act, ſhall be removed or ſuperſeded by any

‘ Writ

'Writ of *Certiorari*, or other Writ from any 'Court at *Weſtminſter*, or other Court 'whatſoever, unleſs the Title of ſuch Tithes, '*&c.* ſhall be in Queſtion.

'And where any Perſon or Perſons com- *A* Modus '*alledg'd.*
'plain'd of for with-holding ſmall Tithes or 'other Duties aforeſaid, ſhall, before the 'Juſtices of Peace, inſiſt upon a Preſcrip- 'tion, *Modus Decimandi*, Cuſtom, *&c.* 'whereby he or ſhe ought to be freed from 'Payment of the ſame, and deliver the 'ſame in Writing to the ſaid Juſtices, ſub- 'ſcrib'd by him or her, and ſhall then give 'reaſonable and ſufficient Security to pay 'all ſuch Coſts and Damages, as on a Trial 'at Law ſhall be given againſt him, her, 'or them, in Caſe the Preſcription, *Modus*, *to be tried at* 'Cuſtom, *&c.* ſhall not upon the ſaid Trial *Law.*
'be allowed. In that Caſe, the Juſtices 'ſhall forbear to give Judgment; and then 'the Perſon complaining ſhall be at Liberty 'to ſue for the ſaid Subſtraction, *&c.* in 'any other Court where he might have 'ſued before the making of this Act.

'That every Perſon obtaining Judgment, *The Juſtices*
'or againſt whom Judgment ſhall be ob- *Judgment.*
'tained before Juſtices out of Seſſions, for 'ſmall Tithes, *&c.* ſhall procure the ſame 'to be enrolled at the next Quarter-Seſſions, 'and the Clerk of the Peace is required 'upon Tender to enroll the ſame, and not 'to receive for ſo doing more than 1 *s.* 'And the Judgment ſo enrolled, and the 'Money ſo adjudg'd being paid, ſhall be a 'good Bar to conclude the ſaid Rector or *A Bar.*

'Vicar,

'Vicar, from any other Remedy for the 'ſaid ſmall Tithes, &c.

Juſtices of another County.

'If the Perſon, againſt whom ſuch Judg-'ment is, ſhall after ſuch Judgment, and 'before the Money adjudg'd is levyed, re-'move out of the County, City, or Corpo-'ration, the Juſtices who made the Judg-'ment, or one of them, ſhall certify the 'ſame under Hand and Seal to any Juſtice 'of Peace of ſuch other County, City, &c. 'where the ſaid Perſon ſhall inhabit, who is 'by Warrant under his Hand and Seal di-'rected to the Conſtables or Church-war-'dens of the Place, or one of them, to levy 'the Sum ſo adjudged in ſuch Manner as 'the ſaid other Juſtices might have done in 'Caſe the Party had not remov'd.

Coſts, &c.

'The ſaid Juſtices who ſhall hear and 'determine the Matters aforeſaid, ſhall have 'Power to give Coſts, not exceeding 10 *s.* 'to the Party proſecuted; if they ſhall find 'the Complaint to be Falſe and Vexatious, 'to be levy'd as aforeſaid.

'Perſons ſued for any Thing done in 'Execution of this Act ſhall recover double 'Coſts, in Caſe the Plaintiff Diſcontinue, 'be nonſuit, or a Verdict paſs againſt 'him.

'No Clerk or other Perſon, who ſhall be-'gin any Suit for recovery of ſmall Tithes, '&c. not exceeding the Value of 40 *s.* in 'the Court of Exchequer, or any Eccleſia-'ſtical Court ſhall have any Benefit by this 'Act for the ſame Matter for which they 'ſo ſued.

Note;

Note; this Act was at firſt only Temporary for three Years, and to the End of the next Seſſion; and afterwards by Statute 10 & 11 *W.* 3. *c.* 15. it is continued for ſeven Years, and thence to the End of the next Seſſion, but by Stat. 3 *Ann. c.* 18. it is made perpetual.

After which ſaid Act, and as I take it, in the ſame Seſſion of Parliament, another Act, (*viz.* 7 & 8 *W.* 3. *cap.* 34.) paſſed for obliging Quakers to pay Tithes, and Church Rates, which Recites, &c. *Stat.* 7 & 8 W. 3. cap. 34.

'And whereas, by Reaſon of a pretended Scruple of Conſcience, *Quakers* do refuſe to pay *Tithes and Church Rates*; be it Enacted by the Authority aforeſaid, That where any Quaker ſhall refuſe to pay or compound for his *great* or *ſmall Tithes*, or to pay any *Church Rates*, it ſhall, and may be lawful to and for the two next Juſtices of Peace of the ſame County, (other than ſuch Juſtice of the Peace, as is Patron of the Church or Chapel, whence the ſaid Tithes do, or ſhall ariſe, or any ways intereſted in the ſaid Tithes) upon the Complaint of any Parſon, Vicar, Farmer, or Proprietor of Tithes, Church-warden or Church-wardens, who ought to have, receive or collect the ſame, by Warrant under their Hands and Seals, to convene before them ſuch Quaker or Quakers, neglecting or refuſing to pay or compound for the ſame, and to examine upon Oath, (which they are thereby impowered to Adminiſter) or in ſuch Matter as by this *Quakers to pay Tithes*, &c. *Two Juſtices*, *on Complaint*, *to convene and Examine*, &c.

'Act is provided, the Truth and Juſtice of
'the ſaid Complaint; and to aſcertain and
and Order Payment not above 10 l. 'ſtate what is due and payable by ſuch
'Quaker or Quakers to the Party or Par-
'ties complaining, and by Order under their
'Hands and Seals to direct and appoint the
'Payment thereof, ſo as the Sum ordered
'as aforeſaid, do not exceed the Sum of
One Juſtice may diſtrain on Non-payment. '10 *l.* and upon Refuſal by ſuch Quaker or
'Quakers to pay according to ſuch Order,
'it ſhall, and may be lawful to and for
'any one of the ſaid Juſtices, by Warrant
'under his Hand and Seal, to levy the
'Money thereby ordered to be paid by Di-
'ſtreſs and Sale of the Goods of ſuch Of-
'fender, his Executors, or Adminiſtrators,
'rendring only the Overplus to him, her,
'or them, neceſſary Charges of diſtraining
'being thereout firſt deducted and allowed
'by the ſaid Juſtice; and any Perſon find-
'ing him, her, or themſelves aggrieved by
'any Judgment given by ſuch two Juſtices
Appeal to the Seſſions. 'of the Peace, ſhall and may appeal to the
'next general Quarter-Seſſions to be held
'for the County, Riding, City, Liberty,
'or Town Corporate; and the Juſtices of
'the Peace there preſent, or the major
'part of them, ſhall proceed finally to hear
Who may Reverſe, 'and determine the Matter, and to reverſe
'the ſaid Judgment, if they ſhall ſee Cauſe;
'and if the Juſtices then preſent, or the
or Affirm, &c. 'major part of them, ſhall find Cauſe to
'continue the Judgment given by the firſt
'two Juſtices of the Peace, they ſhall then
'Decree the ſame by Order of Seſſions, and

'ſhall

'shall also proceed to give such Costs against 'the Appellant, to be levy'd by * Distress 'and Sale of the Goods and Chattels of the 'said Appellant, as to them shall seem just 'and reasonable; and no Proceedings or 'Judgment had by Virtue of this Act, shall 'be removed, or superseded by any Writ 'of *Certiorari*, or other Writ out of his 'Majesty's Courts at *Westminster*, or any 'other Court whatsoever, unless the Title 'of such Tithes shall be in Question.

* i. e. *by a Sessions Warrant.*

No Certiorari.

'*Provided*, That in Case any such Ap- 'peal be made as aforesaid, no Warrant of 'Distress shall be granted until after such 'Appeal be determined. *Provided* also, 'That this Act shall continue in Force for 'the Space of seven Years, and from thence 'to the End of the next Session of Parlia- 'ment, and no longer.

No Distress 'till Appeal determined.

Continuance.

But by Statute 13 *W.* 3. *c.* 4. the said Act was further continued for eleven Years, and thence to the End of the next Sessions of Parliament, and by a subsequent Act is made perpetual.

The same Act was likewise more fully enforced and extended by another Act made 1 *Geo.* 1. *c.* 6. which, in the Second Section thereof, Enacts, 'That the Remedy pro- 'vided by the said Act 7 & 8 *W.* 3. for the '*Recovery of Tithes and Church Rates* shall 'be extended, and may be used against any 'Quaker for recovering of any Tithes or 'Rates, or any Customary, or other 'Rights, &c. belonging to any Church or 'Chapel, which by Law and Custom ought

Stat. 1 Geo. 1. cap. 6. Sect. 2.

Quakers to pay, &c. as the Act supra *directs.*

'to be paid for the Stipend and Maintenance of any Miniſter, &c.

'And any two Juſtices of the Peace of the Place, other than the Patron of any ſuch Church, &c. or any Ways intereſted in the ſaid Tithes, &c. on Complaint of any Parſon, &c. are to ſummon in Writing under their Hands and Seals, by reaſonable Warning, ſuch Quaker againſt whom ſuch Complaint is made, and after his Appearance, or in Default thereof, (the ſaid Summons being proved upon Oath) to proceed to hear and determine the ſaid Complaint, and to make ſuch Order therein as in the ſaid Act directed: And alſo to order ſuch Coſts and Charges as they ſhall think reaſonable, not exceeding 10*s.* as upon the Merits of the Cauſe ſhall appear Juſt. Which Order ſhall be ſo executed, and on Appeal to the Quarter-Seſſions may be reverſed or affirm'd, and ſhall not be removed into any other Court, unleſs the Title of ſuch Tithes, &c. ſhall be in Queſtion, as in and by the ſaid Act *ſupra* is provided.

We have now gone through all the ſeveral Branches of the Common Law, whereby the Right of Tithes and other Eccleſiaſtical Duties are guided and directed; we have alſo ſhewn and explain'd the ſeveral Statutes, whereby any Proviſion is made directive of thoſe Rights or Remedies, and how, and in what Manner they are to be ſued for, or defended.

It

It remains only, That ſomething ſhould be ſaid of the Manner of Cuſtomary Tithing, otherwiſe called a *Modus Decimandi.* * The Rules whereof in general are to be found before, diſpers'd through the ſeveral Parts of this Treatiſe, where 'tis ſhewn, That Cuſtom and Preſcription muſt be the Guide to direct every *Modus Decimandi*, and that all Cuſtoms and Preſcriptions, and conſequently a *Modus Decimandi* is to be tried by a Jury at Common Law, who are the only proper Judges of ſuch Cuſtoms; and therefore I ſhall only add a diſtinct Chapter touching the Cuſtom of Tithing in the City of *London.*

* *Vide ante*, pag. 85, 121, 179, 212, 213, &c. 223, &c. 227, 347, 350, 351, &c. 425, &c.

CHAP. XI.

Of the ancient Cuſtom or Modus *of tithing in* London, *and by what Means it progreſſively varied, 'till ſettled by Stat.* 37 H. 8. c. 12. *and the Decree made thereupon; alſo of the Proviſion made by Stat.* 22 & 23 Car. 2. c. 15. *For Payment of Tithes in the ſeveral Pariſhes in* London *therein mentioned; and a Liſt of ſuch Pariſhes, and what Rate-Tithes each Pariſh is to pay: With Precedents of Declarations,* &c. *on the ſaid Statute.*

IT appears from our ancient Records and Hiſtories, That the Legiſlative Power of this Kingdom had always a peculiar Care to preſerve the Privileges, Cuſtoms and Uſages of the City and Citizens of *London*, more eſpecially their *Modus Decimandi*, or Cuſtom of Tithing; and therefore all the Statutes that have directed the Payment of Tithes, have particular Clauſes therein inſerted, That ſuch Act ſhall not extend to the City or Citizens of *London*, &c. *vide ante, pag.* 24, 25. &c.

Of the ancient Cuſtom of paying Titbes in London.

But what the antient Cuſtom of *London* was therein, will beſt appear from the Argument

guments uſed in the Caſe of *Dunn* verſ. *Burrell* and *Goff*, which, as it is reported in *Privilegia Londini*, p. 93, &c. was thus, *viz.*

One Mr. *Dunn*, Parſon of *Grace-Church* in *London*, had exhibited a Petition to the then Lord-Mayor according to the Cuſtom of the ſaid City, againſt the Defendants and others his Pariſhioners, for a Sum of Money claimed by him in Lieu of Tithes due to him from them, as inhabiting within his Pariſh; but Suit being by the Defendants made to the then Lord Chancellor *Bacon*, he repreſents the Matter to the King, who thereupon commiſſioned the Archbiſhop of *Canterbury*, the ſaid Lord Chancellor, and divers other Peers and Judges to hear the Cauſe. And thereupon as to the Points, what was antiently paid by the Citizens of *London* for Tithes, and how thoſe Payments grew and became varied, It was ſaid,

Parſon Dunn's *Caſe*; *See* Calthorp's *Caſes*, *and* Strype's *Survey*, *Lib.* 2. *pag.* 155. *and Lib.* 5. *pag.* 22, 23, 24, &c.

and how thoſe Payments grew, &c.

That it appears by the Records of the ſaid City, That *Niger* Biſhop of *London*, 13 *Hen.* 3. made a Conſtitution in Confirmation of an antient Cuſtom formerly uſed Time out of Mind, that Proviſion ſhould be made for the Miniſters of *London* in this Manner; that is to ſay, that he which payeth the Rent of twenty Shillings for his Houſe wherein he dwelt, ſhould offer every *Sunday*, and every Apoſtle's Day, whereof the Evening was faſted, one Half-penny: And he that paid but 10 *s.* Rent yearly, ſhould offer but one Farthing; and all this amounted unto according to the Proportion of 2 *s.* 6 *d. per* Pound; for there were fifty-two *Sun-*

Niger *Biſhop of* London's *Conſtitution* 13 Hen. 3.

days, and but eight Apoſtles Days, the Vigils of which were faſted. And if it chanced that one of the Apoſtles Days fell upon a *Sunday*, then there was but one Half-penny, or Farthing paid; ſo that ſometimes it fell out to be ſomewhat leſs than 2 *s.* 6 *d. per* Pound: And it appeareth by our Book-caſes, in *Edward* the Third's Reign, that the Proviſion made for the Miniſters of *London*, was by *Offerings* and *Obventions*; howſoever the Particulars are not deſigned there, but muſt be underſtood according to the former Ordinance made by *Niger*; and thus, the Payment of 2 *s.* 6 *d.* in the Pound continued until 13 *Rich.* 2. *Thomas Arundel*, Archbiſhop of *Canterbury*, made an Explanation of the Conſtitution made by *Niger*, and thruſt upon the Citizens of *London* two and twenty other Saints Days than were meant by the Conſtitution made by *Niger*, whereby the Offerings then amounted unto the Sum of 3 *s.* 5 *d. per* Pound; and there being ſome Reluctation made by the Citizens of *London* againſt it, Pope *Innocent* in 5 *Hen.* 4. granted his Bull, whereby the former Explanation was confirmed; which Confirmation (notwithſtanding the Difference between the Clergy and Citizens of *London* about thoſe two and twenty Saints Days, which were added unto their Number,) Pope *Nicholas* alſo, by his Bull in 31 *H.* 6. confirmed: Againſt which the Citizens of *London* did alſo contend, and that with ſo high a Hand, that they cauſed a Record to be made, whereby it might appear in future Ages, that the Order of Explanation made by the Archbiſhop of *Canterbury*, was done

30 Ed. 3. 1.
10 Ed. 3. 3.
Tho. Arundel *Archbiſhop of* Canterb. 13 R. 2.
Pope Innocent. 5 H. 4.
Pope Nich. 31 H. 6.

done without calling the Citizens of *London* unto it, or any Conſent given by them. And it was branded by the Name of an *Order ſurreptitiouſly and abrubtitiouſly gotten, and therefore more fit to have the Name of a Deſtructory, than a Declaratory Order*: But notwithſtanding this Contention, it ſeems the Power and Intereſt of the Clergy was then ſo great, that the Payment was moſt uſually made according to the Rate of 3 *s.* 5 *d.* in the Pound; for *Linwood*, who writ in the Time of King *Hen.* 4. in his Provincial Conſtitutions, debating the Queſtion, Whether the Merchants and Artificers of the City of *London* ought to pay any Tithes? ſheweth, that the Citizens of *London*, by an ancient Ordinance obſerved in the ſaid City, are bound every Lord's Day, and every principal Feaſt-Day, either of the Apoſtles, or others, whoſe Vigils are faſted, to pay one Farthing for every ten Shillings Rent, that they paid for their Houſes wherein they dwelt; and in 36 *Hen.* 6. there was a Compoſition made between the Citizens of *London* and the Miniſters of *London*, that a Payment ſhould be made by the Citizens, according unto the Rate of 3 *s.* 5 *d.* in the Pound; and if any Houſe were kept in the proper Hand of the Owner, or were demiſed without Reſervation of any Rent; then the Church-Wardens of the Pariſh, where the Houſes were, ſhould ſet down a Rate of the Houſes, and, according to that Rate, Payment ſhould be made. After which Compoſition ſo made, there was an Act of Common Council made 14 *Ed.* 4. in *London*, for the Confirmation of the Bull grant-

Lindwood, *fol.* 146.

36 H. 6.

14 Ed. 4.

granted by Pope *Nicholas*. But the Citizens of *London* finding that by the Common Laws of the Realm, no Bull of the Pope, nor Arbitrary Compoſition, nor Act of Common Council, could bind them in ſuch Things as concerned their Inheritance; they ſtill wreſtled with the Clergy, and could not condeſcend unto the Payment of the ſaid eleven Pence by the Year, obtruded upon them by the Addition of the two and twenty Saints-Days; whereupon there was a Submiſſion unto the Lord Chancellor, and divers others of the Privy Council, and they made an Order for the Payment of Tithes, according unto the Rate of 2 *s.* 9 *d.* in the Pound; the which Order was firſt promulgated by a Proclamation made, and afterwards eſtabliſhed by an Act of Parliament made 17 *H.* 8. *c.* 21. In Confirmation of which ſaid Order, there was a Decree made 37 *H.* 8. with ſome further Additions; the which ſaid Decree was confirmed by an Act of Parliament made 37 *Hen.* 8. *c.* 12. So as it appeareth by that which hath been ſaid, that the firſt Payment was only according unto the Rate of 2 *s.* 6 *d. per* Pound; afterwards the Payment was increaſed to the Rate of 3 *s.* 5 *d. per* Pound. And laſtly, there was an Abatement and Payment made only according to the Rate of 2 *s.* 9 *d.* in the Pound. The firſt Payment grew by *Cuſtom*, the ſecond by *Conſtitutions*, and *Bulls* of the Pope; the laſt by *Decree* in the Chancery; *which Decree, by the Act, ought to have been enrolled in Chancery in ſix Months; but Search hath been, and it is not found.*

Submiſſion to the Lord Chancellor, and Privy Council.

Stat. 17 H. 8. *and Decree* 37 H. 8.

Stat. 37 H. 8.

And

And as to the laſt Point, which was, Who ſhall be Judge of the Payment of Tithes for Houſes in *London*, and the Remedy for the Recovery of them? It was ſaid to be apparent out of the Words of the Decree, that the *Mayor* of the City of *London* is Judge, and is to give Order concerning them; and Suit is not to be made in the Eccleſiaſtical Court for them; and if it be, a *Prohibition* is to be granted, inſomuch that the Party grieved reſorteth unto another Judge than the Statute hath appointed. But if the *Mayor* do not give Aid within two Months after Complaint made, or do not give ſuch Aid as is fitting, then Reſort is to be made unto the Lord Chancellor of *England*, who hath three Months given him for ending of the ſaid Cauſe.

The Lord-Mayor to be Judge.

Prohibition.

Lord Chancellor.

Note alſo, That one material Part of the Argument was, Whether by the Common Law any thing can be demanded for the Houſes in *London*? And it was argued to be clear, that nothing can be demanded of Common Right. For that which the Parſon ought to demand of Houſes is Tithes; and it is improper, and cannot be, that Tithes can be paid of Houſes. Firſt, In regard that Houſes do not increaſe and renew, but rather decreaſe for want of Reparations, and Tithes are not to be paid of any Thing but ſuch Things as do increaſe and renew; as it appeareth by the Levitical Law, and the Common Law of the Land. *Secondly*, Houſes are Matters of Inheritance, whereof a *Præcipe* lieth at the Common Law. And the Rent reſerved upon a Leaſe made of

What the Parſon may by Law demand for Houſes in London? F. N. B. *fol.* 53.

No Tithes due for Houſes, of Common Right;

becauſe Part of the Inheritance, &c.

of them, is likewiſe knit unto the Inheritance, and Parcel of it; ſo that it ſhall go along unto him that hath the Inheritance, and therefore ſhall deſcend unto the Heir: And it is a Rule in Law, that Tithes are not to be paid of Part of the Inheritance, but they ought to be paid of ſuch Things as renew, or grow out of the Inheritance; upon which Reaſon it is, That Tithes, by the Common Law of the Land, are not to be paid of Slate, Stone and Coal digged out of the Pit. *Thirdly*, Houſes being built only for the Receiving, Habitation and Dwelling of Men, and for Conveniency of Protection againſt the ſcorching Heats in Summer, and tempeſtuous Storms in Winter, without any Profit at all redounding unto the Owner; and the Parſon being to have a Benefit otherwiſe, in the Payment of Perſonal Tithes ariſing through his Trade and Induſtry in the Houſe, no Tithes can be demanded for the Houſes themſelves, or for the Rent reſerved upon them. *Fourthly*, The Decree made 38 *H.* 8. which exempteth the Houſes of Noblemen from the Payment of any Rate-Tithes, ſheweth the Common Law to be ſo, that Houſes of themſelves are to be diſcharged of the Payment of Tithes; and accordingly it hath been adjudged in divers Caſes happening at the Common Law, that Tithes by the Courſe of the Common Laws may not be demanded for Houſes, but they are to be diſcharged therefrom. And as to the Point, which was, Whether Cuſtom can eſtabliſh a Right of Payment of any Thing unto the Parſon for Houſes? It ſeem'd

34 Eliz. Dawſon's *Caſe, King's Bench.*

But Cuſtom may make Houſes Tithable, as a Modus Decimandi.

ſeem'd clear, that it well might; for it may well be, that before ſuch Time as any Houſe was built on the Ground where the Houſe is, there had been a Sum of Money paid for the Profits of the Ground, in the Name of a *Modus Decimandi*; and though the Houſe was after built on the Ground, yet the *Modus* continues. And there being a Continuance of the *Modus* after the Building of the Houſe, Time has made it to be a Payment for the Houſe; but this Payment is to be termed a *Modus Decimandi*, and cannot well be called a Tithe paid for Houſes, becauſe, as it is formerly ſaid, Tithes may not be paid for Houſes: And all this appears by Dr. *Grant*'s Caſe in 11 *Co. fol.* 16. which was in Effect thus:

Dr. *Grant*, Parſon of the Pariſh of St. *Leonard*'s in *Foſter-lane*, *infra Præcinctum Sti. Martini le Grand*, libelled in the Spiritual Court againſt *Edward Taylor*, Farmer or Tenant of an antient Houſe, called the *Dean*'s *Houſe*, within the ſaid Precinct, late Parcel of the Poſſeſſions of the Abbot of *Weſtminſter*; and alledged that every Pariſhioner or Inhabitant, having or occupying a Manſion-Houſe, Shop, Warehouſe, Cellar or Stable, within the ſaid Pariſh of St. *Leonard*'s in the Precinct aforeſaid, had paid every Year by Quarterly Payments at *Eaſter*, *Chriſtmas*, St. *John* and *Michaelmas*, Time out of Mind, or at leaſt from the Foundation, Donation and Erection of the ſaid Rectory of St. *Leonard*'s, by equal Portions, to the Parſons of the ſaid Rectory for the Time being, *Nomine & loco Decimarum ſuarum juxta Ratam cujuſlibet* *Dr. Grant's Caſe.*

cujuſlibet viginti Solidorum Redditus per Annum ex qualibet hujuſmodi Domo, Shopa, Sollar, Sellar, ſive Stabulo, ſic tent' ſive occupat' in prædict' Parochia duos ſolidos legalis Monetæ Angliæ, &c. That the ſaid *E. T.* and his Family did dwell in the ſaid Houſe three Years, and had poſſeſſed the ſame for the ſaid Time, *ſub annuali Redditu ſexdecim Librarum ſeu ſaltem Duodecim Librarum, &c.* and ſo demanded 2 *s.* in the Pound, *&c.* Hereupon the ſaid *E. Taylor* ſuggeſted for a Prohibition, That the late Abbot of *Weſtminſter*, and all his Predeceſſors, till the Diſſolution of the ſaid Monaſtery, which was *Anno* 30 *H.* 8. had held the ſaid Houſe diſcharged of Tithes, and ſet forth the Stat. of 31 *H.* 8. and conveyed to himſelf a Leaſe for Years, *&c.* and thereupon had a *Prohibition* granted by the Court. To which, Dr. *Grant* appearing, *Taylor* declared againſt him to the Effect aforeſaid, and the Doctor traverſed the Preſcription of Diſcharge of Tithes, and the Iſſue tried in *London*, and found for the Doctor.

But it was moved by *Taylor*'s Counſel, That upon the ſaid Libel no *Conſultation* ought to be granted, for of Common Right no Tithes ought to be paid of Houſes of Habitation, nor for any Rent reſerved upon a Leaſe of them; for Tithes ought to be paid of Things, which grow and renew Year by Year, by the Act of God. *Reg.* 53. *b. F. N. B.* 54. and *F.* Tit. *Diſmes* 16. and not for Dwelling-Houſes, or for Rents reſerved and created merely by the Act of the Party. And therefore in the City of *London* the

Parſons have 2*s.* 8*d.* in the Pound in the Name of Tithes; but this is by a Decree made 1535. which is confirmed by Authority of Parliament, *Anno* 37 *H.* 8. *c.* 12. But St. *Martin's le Grand* is not within the ſaid Decree and Act; for though it is within *London*, yet it is not of it, and therefore it remains at Common Law, as 5 *E.* 4. 15. and in 30 *E.* 3. 1. *a.* and 38 *E.* 3. 13. it is ſaid by *Finchden*, That the Profits of the Churches in *London* are the Oblations and Obventions paid by Cuſtom. *The Decree and Act of 37 H. 8.* *Note.*

But in this Caſe of Dr. *Grant*, it was reſolved by the whole Court, That a Conſultation ſhould be granted, For it may have a lawful Beginning; for it may be, That for all the Land upon which the Houſes are built, this *Modus Decimandi* hath Time out of Mind been paid; and although the ſame Land be after built on, that ſhall not take away the Parſon's Right to the *Modus*; for it might have a lawful Beginning, and the ſame hath been uſed Time out of Mind.

It was alſo reſolved, That for this Cuſtomary Payment of Monies (the Place being no Part of *London*,) the Parſon might ſue in the Eccleſiaſtical Court, becauſe it is in the Name of Tithes, *viz.* a *Modus Decimandi*; and every antient City and Borough hath for the moſt part ſuch a Cuſtom *de modo Decimandi* for their Houſes, for the Maintenance of their Parſons; and as to the Opinions of 30 *E.* 3. and 38 *E.* 3. it was ſaid, That *obventio dicitur ab obveniendo*, and includes Oblations, Rents, and other Revenues, *&c.* See 11 *Co.* 16, *&c.* *Note.* Obventio quid & unde.

After

Dr. Leyfield's Caſe. Hob. 11.

After this Caſe of Dr. *Grant*, Dr. *Leyfield*, Parſon of St. *Clement*'s, without *Temple-Bar*, (which is alſo out of *London* and the Liberties thereof) ſued for the Tithes of certain Stables, and libelled that by Common Right and Preſcription, Time out of Mind, the Parſons there uſed to have a *Modus Decimandi* for the Houſes, Stables and Buildings, that is to ſay, after the Rate of the tenth Part of the yearly Rent, or the Value of the ſame; and on ſhewing this to the Court of *B. R.* a Prohibition was granted; and the Caſe being after moved for the Defendant, though the ſaid Caſe of Dr. *Grant* was urged, yet it was ordered by the Court, That the Plaintiff in the Prohibition ſhould declare thereupon, and ſo bring the Matter to be judicially determined by the Court. See *Hob.* 11. and as to the like Cuſtoms for Tithes of Houſes. See *Cro.* 139. 1 *Keb.* 602. 2 *Keb.* 280. 3 *Lev.* 386.

Stat. 37 H. 8. c. 12.

Now the ſaid Act of 37 *H.* 8. *c.* 12. is as follows:

Differences between the Clergy and Citizens of London.

Where of late Time Contention, Strife and Variance hath riſen and grown within the City of *London*, and the Liberties of the ſame, between the Parſons, Vicars and Curates of the ſaid City, and the Citizens and Inhabitants of the ſame, for and concerning the Payment of Tithes, Oblations and other Duties within the ſaid City and Liberties; for appeaſing whereof a certain Order and Decree was made thereof by the moſt Reverend Father in God, *Thomas* Archbiſhop of *Canterbury*, Metropolitan and Chief Primate of all *England*, *Thomas Audley*, Knight, Lord

Lord *Audley* of *Walden*, and then Lord Chancellor of *England*, now deceaſed, and other of the King's moſt Honourable Privy Council; and alſo the King's Letters Patent, and Proclamation was made thereof, and directed to the ſaid Citizens concerning the ſame. Whereupon it was after moved in the Parliament, holden at *Weſtminſter* by Prorogation the 4th Day of *February*, in the 27th Year of the King's Majeſty's moſt Noble Reign, by Authority of the ſame Parliament, That the Citizens, and the Inhabitants of the ſame City, ſhould at *Eaſter* then next coming, pay unto the Curates of the ſaid City and Suburbs, all ſuch and like Sums of Money for Tithes, Oblations and other Duties, as the ſaid Citizens and the Inhabitants, by the Order of the ſaid late Lord Chancellor, and other the King's moſt Honourable Council, and the King's ſaid Proclamation, paid, or ought to have paid, by Force and Virtue of the ſaid Order at *Eaſter*, which was in the Year of our Lord 1535. And the ſame Payments ſo to continue from Time to Time, until ſuch Time as any other Order or Law ſhould be made, publiſhed, ratified and confirmed by the King's Highneſs, and the thirty-two Perſons by his Grace to be named, as well for the full Eſtabliſhment concerning the Payment of all Tithes, Oblations, and other Duties of the Inhabitants within the ſaid City, Suburbs and Liberties of the ſame, as for the making of the other Eccleſiaſtical Laws of this Realm of *England*, and that every Perſon denying to pay, as is aforeſaid, ſhould,

Recital of an Act of 27 H. 8.

A new Body of Eccleſiaſtical Laws intended.

by the Commandment of the Mayor of *London* for the Time being, be committed to Priſon, there to remain until ſuch Time as he or they ſhould have agreed with the Curate or Curates for their ſaid Tithes, Oblations and other Duties, as is aforeſaid, as in the ſaid Act more plainly appeareth. Sithen which Act divers Variances, Contentions and Strifes are newly riſen, and grown between the ſaid Parſons, Vicars and Curates, and the ſaid Citizens and Inhabitants, touching the Payment of the Tithes, Oblations and other Duties, by Reaſon of certain Words and Terms ſpecified in the ſaid Order, which are not ſo plainly and fully ſet forth, as is thought convenient and meet to be; for appeaſing whereof as well the ſaid Parſons, Vicars and Curates, as the ſaid Citizens and Inhabitants have compromitted, and put themſelves to ſtand to ſuch Order and Decree, touching the Premiſſes, as ſhall be made by the ſaid Right Reverend Father in God, *Thomas* Archbiſhop of *Canterbury*, Metropolitan and Primate of *England*, the Right Honourable Sir *Thomas Wryotheſly*, Knight, Lord *Wryotheſly* and Lord Chancellor of *England*, the Right Honourable *Thomas* Duke of *Norfolk*, Lord Treaſurer of *England*, the Right Honourable Sir *William Pawlet*, Knt. Lord *St. John*, Lord Preſident of the Council, and Lord Great Maſter of the King's moſt Honourable Houſhold, the Right Hon. Sir *John Ruſſel*, Knt. Lord *Ruſſel* and Lord Privy Seal, the Right Honourable *Edward* Earl of *Hertford*, Lord Great Chamberlain of *England*, the Right Honourable

Difference ſubmitted to a Compromiſe, &c.

nourable *John* Viſcount *Liſle*, High Admiral of *England*, Sir *Richard Liſter*, Knight, Chief Juſtice of *England*, Sir *Edward Mountague*, Knight, Chief Juſtice of the Common Bench at *Weſtminſter*, and Sir *Roger Cholmley*, Knight, Chief Baron of the Exchequer, for a final End and Concluſion to be had and made touching the Premiſſes for ever; and to the Intent to have a full Peace and perfect End between the ſaid Parties, their Heirs and Succeſſors, touching the ſaid Tithes, Oblations, and other Duties for ever: Be it enacted, by the Authority of this preſent Parliament, That ſuch End, Order and Direction, as ſhall be made, decreed and concluded by the forenamed Archbiſhop, Lords and Knights, or any ſix of them, before the 1ſt Day of *March* next enſuing, of, for and concerning the Payments of the Tithes, Oblations and other Duties, within the ſaid City, and the Liberties of the ſame, *and enrolled in the King's High Court of Chancery of Record*, ſhall ſtand, remain and be as an Act of Parliament, and ſhall bind as well all Citizens and Inhabitants of the ſaid City and Liberties for the Time being, as the ſaid Parſons, Vicars, Curates and their Succeſſors for ever, according to the Effect, Purport and Intent of the ſaid Order and *Decree ſo to be made and enrolled*; and that every Perſon, denying to pay any of his or their Tithes, Oblations or other Duties, contrary to the ſaid Decree to be made, ſhall by the Commandment of the Mayor of *London*, for the Time being, and in his Default or Negligence, by the

Lord Chancellor of *England*, be committed to Priſon, there to remain 'till ſuch Time as he or they have agreed with the Curate and Curates, for his or their ſaid Tithes, Oblations, or other Duties, as is aforeſaid.

The Decree made in Purſuance of the ſaid Act.

As touching the Payment of Tithes in the City of London, *and the Liberties of the ſame, it is fully ordered and decreed by the moſt Reverend Father in God,* Thomas *Archbiſhop of* Canterbury, *Primate and Metropolitan of* England, Thomas *Lord* Wryotheſley, *Lord Chancellor of* England, William *Lord* St. John, *Preſident of the King's Majeſty's Council, and Lord Great Maſter of his Highneſs's Houſhold,* John *Lord* Ruſſel, *Lord Privy Seal,* Edward *Earl of* Hartford, &c. ut ante, *and* Roger Cholmley, *Knight, Chief Baron of his Grace's Exchequer, this preſent 24th Day of* February, Anno Dom. ſecundum curſum & computationem Eccleſiæ Anglicanæ Milleſimo quingenteſimo quadrageſimo quinto, *according to the Stat. in ſuch Caſe lately provided, That the Citizens and Inhabitants of the ſaid City of* London, *and Liberties of the ſame for the Time being, ſhall yearly, without Fraud or Covine, for ever pay their Tithes to the Parſons, Vicars and Curates of the ſaid City and their Succeſſors for the Time being, after the Rate hereafter following, that is to wit,*

1s. 4d. for every 10s. Rent, &c.

of every 10s. *Rent by the Year, of all and every Houſe or Houſes, Shops, Warehouſes, Cellars, Stables, and every of them, within the ſaid City and Liberty of the ſame* 16d. ob. *and of every* 20s. *Rent by the Year, of all and every ſuch Houſe and Houſes, Shops, Warehouſes, Cellars and Stables, and every of them, within*

within the ſaid City and Liberties 2s. 9d. *and ſo above the Rent of* 20s. *by the Year, aſcending from* 10s. *to* 10s. *according to the Rate aforeſaid.*

Item, That where any Leaſe is or ſhall be made of any Dwelling-houſe or Houſes, Shops, Warehouſes, Cellars or Stables, or any of them, by Fraud or Covin, reſerving leſs Rent than hath been accuſtomed, or is, or that any ſuch Leaſe ſhall be made without any Rent reſerved upon the ſame, by Reaſon of any Fine or Income paid beforehand, or by any other Fraud or Covine, That then in every ſuch Caſe, the Tenant or Farmor, Tenants or Farmors thereof ſhall pay for his or their Tithes of the ſame, after the Rate aforeſaid, according to the Quality of ſuch Rent or Rents, as the ſame Houſe or Houſes, Shops, Warehouſes, Cellars or Stables, or any of them, were laſt letten for, without Fraud or Covin, before the making of ſuch Leaſe. *Againſt fraudulent Leaſes.*

Item, That every Owner or Owners, Inheritor or Inheritors of any Dwelling-houſe or Houſes, Shops, Warehouſes, Cellars or Stables, or any of them, within the ſaid City and Liberties inhabiting or occupying the ſame himſelf or themſelves, ſhall pay after ſuch Rate or Tithes as is aboveſaid, *after the Quantity* of ſuch yearly Rent as the ſame was laſt letten for, without Fraud or Covin.

Item, If any Perſon or Perſons have taken, or hereafter ſhall take any Meaſe or Manſion-Place by Leaſe, and the Taker or Takers thereof, his or their Executors or Aſ- *Leſſees dwelling in Part of a Houſe, &c.*

ſigns, doth or ſhall inhabit in any Part thereof, and have or hath within eight Years laſt paſt, before this Order, or hereafter will or ſhall let out the Reſidue of the ſame, that then in ſuch Caſe the Principal Farmor or Farmors, or firſt Taker or Takers thereof, his or their Executors or Aſſigns, ſhall pay his or their Tithes, after the Rate aboveſaid, according to the Quantity of their Rent by Year.

If divers Houſes, &c. be taken by one Leaſe.

And if that any Perſon or Perſons have, or ſhall take divers Manſion-houſes, Shops, Warehouſes, Cellars or Stables, in one Leaſe, and letteth, or ſhall let out one or more of the ſaid Houſes, and keepeth, or ſhall keep one or more in his or their own Hands, and inhabiteth or inhabit in the ſame, that then the ſaid Taker or Takers, and his or their Executors or Aſſigns ſhall pay his or their Tithes after the Rate aboveſaid, according to the Quantity of the yearly Rent of ſuch Manſion Houſe or Houſes, retained in his or their Hands; and that his Aſſignee or Aſſignees of the Reſidue of the ſaid Manſion Houſe or Houſes, ſhall pay his or their Tithes after the Rate aboveſaid, according to the Quantity of their yearly Rents.

Item, If ſuch Farmor or Farmors, or his, or their Aſſigns, of any Manſion Houſe, or Houſes, Warehouſes, Shops, Cellars, or Stables, hath at any Time within eight Years laſt paſt, or ſhall hereafter let over all the ſaid Manſion Houſe or Houſes contained in his or their Leaſe to one Perſon, or to divers Perſons, that then the Inhabi-

tants, Leſſees or Occupiers of them, and every of them, ſhall pay their Tithes after the Rate of ſuch Rents, as the Inhabitants Leſſees or Occupiers, and their Aſſignee or Aſſignees have been, or ſhall be charged withal, without Fraud or Covin.

Item, If any Dwelling-houſe within eight Years laſt paſt was, or hereafter ſhall be converted into a Warehouſe, Storehouſe, or ſuch like, within the ſaid eight Years, was, or thereafter ſhall be converted into a Dwelling-houſe, that then the Occupiers thereof ſhall pay Tithes for the ſame after the Rate above declared of Manſion Houſe Rents. *Houſes converted, &c.*

Item, That where any Perſon ſhall demiſe any Dy-houſe or Brew-houſe, with Implements convenient and neceſſary for Dying or Brewing, reſerving a Rent upon the ſame, as well in Reſpect of ſuch Implements, as in Reſpect of ſuch Dy-houſe or Brew-houſe, then the Tenant ſhall pay his Tithes after ſuch Rate as is aboveſaid, the third Penny abated; and that every principal Houſe or Houſes, with Key or Wharf, having any Crane or Gibit belonging to the ſame, ſhall pay after the like Rate of their Rents as is aforeſaid, the third Penny abated; and that other Wharfs belonging to Houſes, having no Crane or Gibit, ſhall pay for his Tithes, as ſhall be paid for Manſion Houſes in Form aforeſaid.

Item, That every Manſion Houſe, with a Shop, Stable, Warehouſe, Wharf, with Crane, Timber-Yard, Teinter-Yard, or Garden belonging to the ſame, or as Parcel

of the ſame, is or ſhall be occupied together, that if the ſame be hereafter ſevered or divided, or at any Time within eight Years laſt paſt were ſevered or divided, that then the Farmor or Farmors, Occupier or Occupiers thereof, ſhall pay ſuch Tithes as is aboveſaid, for ſuch Shops, Stables, Warehouſes, Wharf with Crane, Timber-Yard, Teinter-Yard, or Garden aforeſaid, ſo ſevered or divided, after the Rate of their ſeveral Rents thereupon reſerved.

Tithes payable Quarterly.

Item, That the ſaid Citizens and Inhabitants ſhall pay their Tithes quarterly, that is to ſay, at the Feaſts of *Eaſter*, the Nativity of St. *John Baptiſt*, St. *Michael* the Arch-Angel, and the Nativity of our Lord, by even Portions.

Offerings diſcharged.

Item, That every Houſholder paying 10*s.* Rent, or above, ſhall for him, or herſelf, be diſcharged of their Four Offering Days, but his Wife, Children, Servants, or others of their Family, taking their Rights of the Church at *Eaſter*, ſhall pay 2*d.* for their Four Days Offerings yearly.

Houſes divided into ſmall Parcels.

Provided always, and it is decreed, That if any Houſe or Houſes which hath been, or hereafter ſhall be letten for 10*s.* Rent by Year or more, be, or hath at any Time within eight Years laſt paſt, or hereafrer ſhall be divided and leaſed into ſmall Parcels or Members, yielding leſs Rent than 10*s.* by Year, that then the Owner or Owners, if he, or they dwell in any Part of ſuch Houſe, or elſe the principal Leſſee and Leſſees, if the Owner or Owners do not dwell in ſome Part of the ſame, ſhall from henceforth pay for his

his or their Tithes, after ſuch Rate of Rent, as the ſame Houſe was accuſtomed to be letten for before ſuch Diviſion, or dividing into Parts or Members; and the under Farmor or Farmors, Leſſee and Leſſees, to be diſcharged of all Tithes for ſuch ſmall Parcels, Parts, or Members, rented at leſs yearly Rent than 10 *s.* by Year, without Fraud or Covin, paying 2 *d.* a-piece yearly for Four Offering Days.

Gardens for Pleaſure.

Provided always, and it is decreed, That for ſuch Gardens as appertain not to any Manſion Houſe, and which any Perſon or Perſons holdeth, or ſhall hold in his or their Hands for Pleaſure, or to his own Uſe, that the then Perſon ſo holding the ſame ſhall pay no Tithes for the ſame; but if any Perſon or Perſons, which holdeth, or ſhall hold any ſuch Garden, containing half an Acre or more, doth or ſhall make any yearly Profit thereof, by way of Sale, that then he or they ſhall pay Tithes for the ſame after ſuch Rate of his Rent, as is herein firſt above ſpecified.

Gardens divided.

Provided alſo, That if any ſuch Gardens, now being of the Quantity of half an Acre or more, be hereafter by Fraud or Covin divided into leſs Quantity or Quantities, then to pay Tithes according to the Rate aboveſaid.

Noblemens Houſes.

Provided alway, That this Decree ſhall not extend to the Houſes of Great Men, or Noblemen, or Noblewomen, kept in their own Hands, and not letten for any Rent, which in Times paſt hath paid no Tithes, ſo long as they ſhall continue ſo unletten; nor

to

to any Halls of Crafts or Companies, ſo long as they be kept unletten, ſo that the ſame Halls in Times paſt have not uſed to pay any Tithes.

Shedds, &c. exempted. *Provided* always, and it is decreed, That this preſent Order and Decree ſhall not in any wiſe extend to bind or charge any Shedds, Stables, Cellars, Timber-Yards, ne Tinter-Yards, which were never Parcel of any Dwelling-houſe, ne appertaining or belonging to any Dwelling-houſe, ne have accuſtomed to pay any Tithes, but that the ſaid Citizens and Inhabitants ſhall thereof be quit of Payment of any Tithes, as it hath been uſed and accuſtomed.

Accuſtomed Rates only. *Provided* alſo, and it is decreed, That where leſs Sum than after 16 *d.* Half-penny in the 10 *s.* Rent, or leſs Sum than 2 *s.* 9 *d.* in the 20 *s.* Rent, hath been accuſtomed to be paid for Tithes, that then in ſuch Places the ſaid Citizens and Inhabitants ſhall pay but only after ſuch Rate as hath been accuſtomed.

Controverſy refer'd to the Mayor. *Item*, It is alſo decreed, That if any Variance, Controverſy, or Strife, do, or ſhall hereafter ariſe in the ſaid City for Non-payment of any Tithes; or if any Variance or Doubt ariſe upon the true Knowledge or Diviſion of any Rent or Tithes within the Liberties of the ſaid City, or of any Extent or Aſſeſſment thereof; or if any Doubt ariſe upon any other Thing contained within this Decree, that then upon Complaint made by the Party grieved to the Mayor of the City of *London* for the Time being, the ſaid Mayor, by the Advice of Council,

Council, ſhall call the ſaid Parties before him, and make a final End of the ſame with Coſts to be awarded by the Diſcretion of the ſaid Mayor and his Aſſiſtants, according to the Intent and Purport of this preſent Decree.

Appeal to the Lord Chancellor.

And if the ſaid Mayor make not an End thereof within two Months after Complaint to him made, or if any of the ſaid Parties find themſelves agrieved, That then the Lord Chancellor of *England* for the Time being, upon Complaint to him made within three Months then next following, ſhall make an End in the ſame with ſuch Coſts to be awarded as ſhall be thought convenient, according to the Intent and Purport of the ſaid Decree.

Rents leſſen'd by Reaſon of Fires, &c.

Provided always, That if any Perſon or Perſons take any Tenement for a leſs Rent than it was accuſtomed to be letten for by Reaſon of great Ruin or Decay, Brenning, or ſuch like Occaſions, or Misfortunes, that then ſuch Perſon or Perſons, his Executors or Aſſigns, ſhall pay Tithes only after the Rate of the Rent reſerved in his or their Leaſe, and none otherwiſe, as long as the ſame Leaſe ſhall endure. Stat. 37 *H.*8. *c.* 12. and Decree.

A Caſe upon the ſaid Statute and Decree.

And note; upon a Motion for a *Prohibition*, the Caſe upon the ſaid Statute and Decree appeared to be, That the yearly Rent of a Houſe in *London* at the Time of the Decree made, and after, was 5 *l.* and a new Leaſe was made of the ſaid Houſe, rendring the ſaid Rent of 5 *l. per Annum*, and over that a great Income or Fine, which

which was covenanted and agreed to be paid yearly the ſame Day that the Rent was paid, as a Sum in Groſs; but ſo much Rent might well have been reſerved for the ſaid Houſe, as both the ſaid 5 *l.* Rent and the Sum in groſs amounted unto; which Reſervation and Covenant were made to defraud the Parſon of the true Tithe of the ſaid Houſe, which he ought to have had according to the Intent of the ſaid Decree; and in that Caſe it was reſolved by the whole Court of *C. B.*

Accuſtomed Rents reſerved.

1. That if ſo much Rent be reſerved as was accuſtomed to be paid at the Time of making the ſaid Decree, (whatſoever Fine or Income be paid) the Parſon can aver no Fraud in the Reſervation of that Rent; for the Words of the Decree are, *Where any Leaſe is, or ſhall be made of any Dwelling-houſe*, &c. *by Fraud or Covin in reſerving leſs Rent than hath been accuſtomed, or is paid* &c.) ſo as if the accuſtomed Rent be reſerved no Fraud can be alledged; for the Fraud by the Decree, is when leſſer Rent than uſual is reſerved; or if no Rent at all be reſerved, that then *Tithes ſhall be paid according to the Rent that then was laſt before reſerved.*

Decree conſiſts of four Parts.

For ſo are the Words of the Decree: Which Decree conſiſts of four Parts, *viz.* *Firſt*, Where the accuſtomed Rent, *&c.* was reſerved. *2dly*, Where the Rent was increaſed, there the Tithes ſhould be paid according to the whole Rent. *3dly*, Where leſs Rent was reſerved. And *4thly*, Where no Rent was reſerved, but had been formerly

ly reſerved: But in this Caſe the Parſon confeſſes that the accuſtomed Rent was reſerved, and therefore had no Cauſe of Suit.

2. It was reſolved, That ſuch Houſes as were never letten to Farm, but inhabited by the Owner, is *Caſus omiſſus*, and ſhall pay no Tithes by Force of the ſaid Decree. *Caſus omiſſus.*

3. It was reſolved, That where the Decree ſaith, (*where no Rent is reſerved by Reaſon of any Fine or Income paid before-hand*) albeit no Fine or Income be paid, yet if no Rent be reſerved, the Parſon ſhall have his Tithes according to the Decree. For that is put but for an Example or Cauſe why no Rent is reſerved; and whether any Fine or Income were paid or no, is not material as to the Parſon; and a *Prohibition* was awarded to the Court of the Chancellor of the Biſhop of *London*, to ſtay the Plaintiff's Suit there. *Mich.* 5 *Jac.* 1. the Caſe of *Skidmore* and *Eyre* verſ. *Bell*, Parſon of St. *Michael Queen-hithe.* 2 *Inſt.* 659. *If no Rent reſerved.*

It has been held, That a Houſe in *London*, which was Part of the Poſſeſſions of a Priory, which were diſcharged of Tithes, was by the aforeſaid Statute charged with *Tithes according to the Ordinance thereof; for before* that Statute, no Dwelling-houſe was chargeable with Tithes, becauſe no Profit ariſes of it, *&c. Q.* and *vide* 3 *Cro.* 276. and *Moor* 912. *Priory Land, &c.*

It has been alſo reſolved, That a Rent for half a Year, and afterwards for another half Year, is a yearly Rent within the Meaning of the Decree; and that, *as the* *Half yearly Rent.*

ſame

ſame was laſt let, is not intended laſt before the Decree, but before Demand of the Tithes; yet if Leſſee for Life leaſes for Years to *A.* reſerving Rent, the Rent ſo reſerved by the Leſſee, ſhall not conclude or bind him in Reverſion to pay Tithes, according to that Rule. See *Noy* 130. Dr. *Mendhouſe* verſus Dr. *Taylor*.

Prohibition where, and the Mayor Judge.

If Suit be in the Spiritual Court for Tithes of the Rents of Houſes in *London*, a Prohibition lies; for by the Statute *ſupra*, the Suit ought to be before the Mayor of *London*, by Complaint in Writing, and not by Word of Mouth only, in Nature of a *Monſtrans de Droit*, declaring all the Title (or rather, as I conceive, in Nature of a Bill in Equity) and if a Suit be in the Spiritual Court for Tithes in *London*, the Court of *B. R.* may grant a Prohibition; and yet that Court cannot meddle with Tithes in *London*. See *Noy* 130. 2 *Inſt.* 650.

But notwithſtanding the ſaid Statute and Decree, divers Preſcriptions for Payment of leſſer Rates than the Parſons might require thereby (as to pay 10*s.* for the Tithe of a Houſe, though the Rent was 50 or 60 *l.* or more) have been claimed and allowed; and ſuch Preſcriptions or Cuſtoms ſeem to be allowed by the ſaid Decree.

But upon the Occaſion of the Fire of *London* in 1666. with reſpect to the Churches thereby conſumed, another Statute was made to make the Maintenance of the Miniſters of ſuch Churches more certain.

The

The Act of 22 & 23 Car. 2. c. 15. Entitled, *For the better Settlement of the Maintenance of the Parſons, Vicars and Curates in the Pariſhes of the City of* London, *burnt by the late dreadful Fire*, recites: *Whereas the Tithes in the City of* London *were levied and paid with great Inequality, and are ſince the late dreadful Fire there, in the rebuilding of the ſame, by taking away of ſome Houſes, altering the Foundations of many, and the new erecting of others, ſo diſordered, That in Caſe they ſhould not for the Time to come be reduced to a Certainty, many Controverſies and Suits at Law might thence ariſe*; and Enacts, *That the annual certain Tithes of all and every Pariſh and Pariſhes within the ſaid City of* London *and the Liberties thereof, whoſe Churches have been demoliſhed, or in Part conſumed, by the late Fire; and which ſaid Pariſhes by Virtue of an Act of this preſent Parliament, Intituled*, An Act for the rebuilding of the City of *London*, uniting of Pariſhes, *&c. Remain and continue ſingle as heretofore they were, or are by the ſaid Act annexed or united into one Pariſh reſpectively, ſhall be as followeth*, (that is to ſay) *The Annual certain Tithes, or Sum of Money in Lieu of the Tithes of the Pariſh.*

Stat. 22 & 23 Car. 2. c. 15.

The Reaſon of the Act.

St. 22 Car. 2. *cap.* 11.

	l.	s.
Of Alhallows Lombard-ſtreet	110	00
Of Saint Bartholomew Exchange	100	00
Of St. Bridget, *alias* Brides	120	00
Of St. Bennet Finck	100	00
Of St. Michael Crooked-lane	100	00
Of St. Chriſtopher	120	00
Of St. Dionys Backchurch	120	00
Of St. Dunſtan *in the Eaſt*	200	00

Of

	l.	s.
Of St. James Garlick Hythe	100	00
Of St. Michael Cornhill	140	00
Of St. Michael Baſſiſhaw	132	11
Of St. Margaret Lothbury	100	00
Of St. Mary Aldermanbury	150	00
Of St. Martin Ludgate	160	00
Of St. Peter Cornhill	110	00
Of St. Stephen Coleman-ſtreet	110	00
Of St. Sepulchre	200	00
Of Alhallows Bread-ſtreet, and St. John Evangeliſt	140	00
Of Alhallows the Great, and Alhallows the Leſs	200	00
Of St. Alban Wood-ſtreet, and St. Olaves Silver-ſtreet	170	00
Of St. Anne and Agnes, and St. John Zachary	140	00
Of St. Auguſtine and St. Faith	178	00
Of St. Andrew Wardrobe, and St. Anne Blackfryars	140	00
Of St. Antholin and St. John Baptiſt	120	00
Of St. Bennet Gracechurch, and St. Leonard Eaſtcheap	140	00
Of St. Bennet Paul's Wharf, and St. Peter Paul's Wharf	100	00
Of Chriſt-Church and St. Leonard Foſter-lane	200	00
Of St. Edmund the King, and St. Nicholas Acons	180	00
Of St. George Botolph-lane, and St. Botolph Billingſgate	180	00
Of St. Lawrence Jury, and St. Magdalen Milk-ſtreet	120	00
Of St. Magnus and St. Margaret New Fiſh-ſtreet	170	00

Of

	l.	s.
Of St. Michael Royal, and St. Martin Vintry	140	00
Of St. Mathew Friday-street, and St. Peter Cheap	150	00
Of St. Margaret Pattons, and St. Gabriel Fenchurch	120	00
Of St. Mary at Hill, and St. Andrew Hubbard	200	00
Of St. Mary Wolnoth, and St. Mary Woolchurch	160	00
Of St. Clement Eastcheap, and St. Martin Orgars	140	00
Of St. Mary Abchurch, and St. Lawrence Pountney	120	00
Of St. Mary Aldermary, and St. Thomas Apostles	150	00
Of St. Mary le Bow, St. Pancras Soper-lane, and Alhallows Honey-lane	200	00
Of St. Mildred Poultry, and St. Mary Cole-church	170	00
Of St. Michael Wood-street, and St. Mary Staining	100	00
Of St. Mildred Bread-street, and St. Margaret Moſes	130	00
Of St. Michael Queenhyth, and Trinity	160	00
Of St. Magnus Old Fish-street, and St. Gregory	200	00
Of St. Mary Somerſet, and St. Mary Mounthaw	100	00
Of St. Nicholas Colebby, and St. Nicholas Olaves	130	00
Of St. Olave Jewry, and St. Martin Ironmonger-lane	180	00

		l.	s.
Of St. Sepulchre Walbrook, and St. Benet Sherehogg	}	100	00
Of St. Swythin, and St. Mary Bothaw	}	140	00
Of St. Vedast, alias Fosters, and St. Michael Querne	}	180	00

Which respective Sums of Money to be paid in Lieu of Tithes within the said respective Parishes, and assessed as herein after is directed, shall be, and continue to be observed, deemed, and taken to all Intents and Purposes, to be the respective certain annual Maintenance (over and above Glebes and Perquisites, Gifts and Bequests to the respective Parson, Vicar and Curate of any Parish for the Time being, or to his or their respective Successors, or to other Persons for his or their Life) of the said respective Parsons, Vicars and Curates, who shall be legally instituted, inducted and admitted into the respective Parishes aforesaid.

The Rate-Tithes shall be paid besides Glebes, Perquisites and Bequests

And that the said yearly Sums of Money for Tithes, may be more equally assessed upon the several Houses, Buildings, and all other Hereditaments whatsoever, within all the said respective Parishes; be it Enacted by the Authority aforesaid, That the Aldermen of such respective Ward or Wards within the said City, wherein any of the said Parishes respectively lie, and his or their Deputy or Deputies, and the Common Councilmen of such respective Ward or Wards, with the Church-Wardens, and one or more of the Parishioners of such respective Parish, wherein the Maintenance aforesaid is respectively to be assessed, to be nominated by such

Who to make the Assessments, and when.

ſuch reſpective Alderman, Deputy, Common Council-men, and Church-Wardens, or any five of them, whereof the Alderman or his Deputy to be one, ſhall at ſome convenient and ſeaſonable Time before the Twentieth Day of May, in the Year of our Lord God, One thouſand ſix hundred and ſeventy-one, aſſemble and meet together in ſome convenient Place within every of the reſpective Parishes, in ſuch reſpective Ward wherein the Maintenance aforeſaid is to be aſſeſſed; and they, or the major Part of them ſo aſſembled, ſhall proportionably aſſeſs upon all Houſes, Shops, Warehouſes and Cellars, Wharfs, Keys, Cranes, Water-houſes (which Water-houſes ſhall pay in their reſpective Parishes where they ſtand, and not elſewhere) and Veſts of Ground (remaining veſted) and all other Hereditaments whatſoever (except Parſonage and Vicarage Houſes) the whole reſpective Sum by this Act appointed, or ſo much of it as it were there what each Impropriator is by this Act enjoined reſpectively to allow, in the moſt equal Way that the ſaid Aſſeſſors according to the beſt of their Judgments can make it; which ſaid Aſſeſſments ſhall be made and finiſhed before the Five and twentieth Day of July then next enſuing.

And be it further Enacted by the Authority aforeſaid, That if any Variance or Doubt ſhall happen to ariſe about any Sum ſo aſſeſſed, as aforeſaid, or that any Pariſhioner or Pariſhioners, or Owner or Owners of any Houſe, Shop, Warehouſe or Cellar, Wharf, Key, Crane, Water-houſe, Veſt of Ground, or other Hereditament within any of the ſaid Parishes, ſhall find himſelf or themſelves aggrieved by the aſſeſſing

If any Variance ariſe upon the Aſſeſſments, who to determine it.

of any Son or Sons of Misery, in Manner and Form aforesaid, That then upon Complaint made to the Party or Parties aggrieved, to the Lord Mayor and Court of Aldermen of the said City, within Twenty Days after Notice given to the Party or Parties affessed, of such Assessment made, the said Lord Mayor and Court of Aldermen, summoning to such the Party or Parties aggrieved, as the Aldermen and such others as make the said Assessment, shall hear and determine the Case in a Summary Way, and the Judgment by them given shall be final, and without Appeal.

6 Regina. A number by all may make exact.

Provided always, and be it Enacted, That any Assessment or Rate to be made or laid by Virtue of this Act, shall or may in all or any the Parishes aforesaid, in the Manner, by or according, or about, or into such Sums within three Months after the Twenty-fourth Day of June, One thousand six hundred and twenty-five, according to the aforesaid Rates, and any such Assessment or Rate, shall or may be again increased, or re-assessed within three Months after the Twenty-fourth Day of June, in the Year of our Lord, One thousand six hundred eighty-one; and that all and every such new Assessment and Rate shall be liable to the like Appeals, as aforesaid, and shall be collected, levied and paid as any other Assessment or Rate mentioned in this Act, may or ought to be.

If the Persons appointed by this Act refuse to act, then others to be elected by the Lord Mayor, &c.

And if the said Aldermen, Deputy, Common Council-Men, and Parishioners or Parishioners as aforesaid, as aforesaid, shall after summons and urgent Notice to that Behalf unto them, by the Lord Mayor and Court of Aldermen, or the Lieutenant or Lieutenants of any of the said respective

such Parish or Parishes, refuse and neglect to make and make such Assessment as aforesaid, That it shall and may be lawful to and for such Parson or Parsons, as shall be thereunto authorized and required by the said Lord Mayor and Court of Aldermen, to make such Assessment, all the said Aldermen, Deputy, Common Councilmen, Church-Wardens, Parishioners or Parishioners aforesaid, should or ought to have been made.

Three Transcripts thereof to be made by the Assessors.

And be it further Enacted by the Authority aforesaid, That the said Assessors within ten Days after such Assessment made, and the respective Appeals (if any be) determined, shall make three Transcripts thereof in Parchment, containing the respective Sums to be payable, or appointed to be paid out of all and every the Premisses within such respective Parish, and subscribe the same under their Hands, and within twenty Days after such Subscription as aforesaid, one of the said Transcripts shall be returned to the Lord Mayor of the City of London, to be kept and preserved by the said Lord Mayor, or and among the Records of the said City, for a perpetual Memorial thereof; And another of the said Transcripts shall be returned into the Registry of the Lord Bishop of London, to be kept and preserved, as aforesaid; And the other of the said Transcripts shall remain and be kept in the Vestry of such respective Parish, for a perpetual Memorial, as aforesaid.

One to be returned to the Lord Mayor.

Another to the Bishop of London's Registry.

The other to remain in the Vestry.

And for the surer and better Payment of the said respective Sums of Money so to be Assessed and Taxed towards the raising of the said Maintenance of the respective Parsons, Vicars and Curates of the said respective Parishes, as

When the same Money shall be paid, and to whom.

aforeſaid, Be it further Enacted by the Authority aforeſaid, That all and every ſuch reſpective Sum and Sums of Money ſo to be aſſeſſed and Taxed, as aforeſaid, towards the raiſing of the ſaid Maintenance of the ſaid reſpective Parſons, Vicars and Curates of the reſpective Pariſhes, ſhall be paid to the ſaid reſpective Parſons, Vicars and Curates, and their Succeſſors reſpectively, at the Four moſt uſual Feaſts, (that is to ſay) at the Annunciation of the Bleſſed Virgin Mary, the Nativity of Saint John Baptiſt, the Feaſt of St. Michael the Archangel, and the Nativity of our Bleſſed Saviour, or within fourteen Days after each of the Feaſts aforeſaid, by equal Payments; the reſpective Payments thereof to begin and commence only from ſuch Time and Times as the Incumbent or Incumbents of ſuch reſpective Pariſh ſhall begin to Officiate or Preach as Incumbent or Parſon in the reſpective Church belonging to ſuch reſpective Pariſh, or in ſome other convenient Place or Places in ſuch reſpective Pariſh or Pariſhes, to be nominated or appointed by the Lord Biſhop of London for the time being, or by the Archbiſhop of Canterbury, in any Place within his Peculiars.

Impropriators to make the ſame Allowances they did before the Fire.

And in any Pariſh or Pariſhes where any Impropriations be, Be it enacted by the Authority aforeſaid, That all and every the Impropriator or Impropropriators of any of the ſaid Pariſhes, ſhall pay and allow what really, and bona fide, they have uſed, and ought to pay and ſatisfy to the reſpective Incumbent of ſuch reſpective Pariſh, at any Time before the ſaid late Fire, and the ſame ſhall be eſteemed and computed as part of the Maintenance of ſuch Incumbent;

bent; notwithſtanding this Act, or any Clauſe or Matter, or thing therein contained.

And be it further enacted by the Authority aforeſaid, That if any the Inhabitants in any reſpective Pariſh or Pariſhes as aforeſaid, ſhall, or do refuſe or neglect to pay to the reſpective Incumbents aforeſaid, of any of the ſaid reſpective Pariſhes, any Sum or Sums of Money to him reſpectively payable, or appointed to be paid by this Act, or any part thereof, contrary to the true Intent and Meaning of this Act, (being lawfully demanded at the Houſe or Houſes, Wharf, Key, Crane, Cellar, or other Premiſſes wherein the ſame is payable) that then it ſhall and may be lawful to and for the Lord Mayor of the City of London *for the time being, upon Oath to be made before him of ſuch Refuſal or Neglect, to give and grant out Warrants for the Officer or Perſon appointed to Collect the ſame, with the Aſſiſtance of a Conſtable in the Day-time, to Levy the ſame Tithes or Sums of Money ſo due, and in arrear and unpaid, by Diſtreſs and Sale of the Goods of the Party or Parties ſo refuſing or neglecting to pay, reſtoring to the Owner or Owners, the Overplus of ſuch Goods, over and above the ſaid Arrears of the ſaid Monies ſo due and unpaid, and the reaſonable Charges of making ſuch Diſtreſs, which he is to deduct out of the Moneys raiſed by Sale of ſuch Goods.*

Upon refuſal of Payment, how to levy it.

Provided always, and be it enacted, That in caſe the Lord Mayor, or Court of Alderment ſhall refuſe or neglect to execute any of the reſpective Powers to them by this Act granted, or to perform all and every ſuch thing relating either to the Aſſeſſing or Levying of the reſpective Sums aforeſaid

If the Lord Mayor refuſe to execute this Act, then who are appointed to execute it.

aforeſaid, as they are by this Act authorized and required to perform, That then it ſhall and may be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal of England for the time being, or any two or more of the Barons of his Majeſty's Court of Exchequer, by Warrant or Warrants under his or their reſpective Hands and Seals, to do and perform what the ſaid Lord Mayor and Court of Aldermen, according to the true Intent and Meaning of this preſent Act, might or ought to have done, and by ſuch Warrant, either to Impower any Perſon or Perſons to make the reſpective Aſſeſſments, as aforeſaid, or to authorize the reſpective Officers or Perſons appointed to Collect the Sums aforeſaid, to Levy the ſame by Diſtreſs and Sale of the Goods of any Perſon or Perſons that ſhall refuſe or neglect to pay the ſame in manner and form aforeſaid.

Provided always, and be it enacted, That where any of the Pariſhes within the ſaid City, have ſince the late Fire, by Death or otherwiſe, become vacant, the ſurviving or remaining Incumbent of the other Pariſh thereto United, or therewith Conſolidated, ſhall have and enjoy, and have like Remedy to recover the Tithes hereby ſettled to be paid, as if he had been actually Preſented, Admitted, Inſtituted and Inducted into both the ſaid Pariſhes, ſince the Union and Conſolidation thereof.

No other Court whatſoever ſhall hold Plea for any Duty ariſing upon this Act.

Provided always, That no Court or Judge Eccleſiaſtical or Temporal, ſhall hold Plea of, or for any the Sum or Sums of Money due and owing, or to be paid by vertue of this Act, or any part thereof, other than the Perſons hereby authorized to have Cognizance thereof: Nor

ſhall it be lawful to or for any Perſon, Vicar, Curate, or Incumbent, to convent or ſue any Perſon or Perſons aſſeſſed as aforeſaid, and refuſing or neglecting to pay the ſame, in any Court or Courts, or before any Judge or Judges, other than what are authoriſed and appointed by this Act, for the hearing and determining of the ſame, in Manner aforeſaid.

Provided always, That it ſhall and may be lawful to and for the Warden and Minor Canons of St. Paul's *Church,* London, *Parſon and Proprietors of the Rectory of the Pariſh of St.* Gregory *aforeſaid, to receive and enjoy all Tithes, Oblations, and Duties ariſing or growing due within the ſaid Pariſh, in as large and beneficial Manner as formerly they have, or lawfully might have done; Any thing herein to the contrary notwithſtanding.*

An Exception for St. Gregory's Church, out of this Act.

As to Forms of *Prohibitions, Declarations* and *Pleadings* in Caſes of Tithes, we (having already exceeded our intended Limits) muſt refer our Readers to the following Books of Entries, (where they may find Variety of Precedents) *viz. Coke's Entries* 161, 162, 226 and 450 to 466. *Winch's Entries* 598 to 651. *Thompſon's Entries* 83, 85. *Brownl. Rediv.* 458. *Read's Decl.* 158, 163, &c. *Brown's Vade Mecum* 243. *Mod. Intr.* 197. *Debt*, &c. on Stat. *Ed.* 6. for not ſetting out or with-holding Tithes. See *Smal's Decl.* Tit. *Prohibitions, Formulæ bene Pl'tandi*, 2d Part, 32 to 37, and *de modo Decimandi* in *London*; *vide ib.* 189, 190, &c.

Prohibitions, Declarations and Pleadings.

A Liſt

A LIST of Abbies, Monaſteries, &c. (here mentioned Page 263.) which on the general Survey taken 26 H. 8. were returned to be of 200l. Value and upwards, per Ann. *and conſequently were diſſolved by Stat. 31 H. 8. and thereby diſcharged of the Payment of* Tithes; *with what Order they were of, and the Times of their Foundations.*

Note theſe Abbrevations; Ab. Abbey, Pr. Priory, C. *Auſt.* Canons of St. *Auſtin*, Mon. Nig. Black Monks, Wh. C. White Canons, *Ben. Benedictines*, *Gilb. Gilbertines*, *Præm. Præmonſtratenſes*, *Carth. Carthuſians*, *Mon. Moniales*, *Clun. Cluniacks*, *Ciſt. Ciſtertians*, T. in the Time of, *Cir. An.* about the Year.

BERKS.

Monaſteries.	*Order.*	*Founded.*	*l.*	*s.*	*d.*
Reading.	Ben.	*Temp.* H. 1.	1938	14	03
Huſſeſham *Ab.*	C. Auſt.	13 Edw. III.	0285	00	00
Abbington *Ab.*	Ben.	*An.* 720.	1876	10	09

BEDFORD.

Newnham *Pr.*	C. Auſt.	*T.* Hen. I.	293	15	11
Elmeſton *Ab.*	Ben.	*T.* W. Conq.	284	12	11
Wardon *Ab.*	Ciſt.	*An.* 1139.	389	16	06
Chickſand *Pr.*	*Wh.* C. Gilb.	*T.* W. Rufus	212	03	05
Dunſtable *Ab.*	C. Auſt.	*T.* Hen. I.	344	13	03
Wooburn *Ab.*	Ciſt.	*T.* John.	391	18	02

BUCKS.

Aſhrug *Cell.*	C. Auſt.	*T.* Edw. I.	416	16	04
Notely *Ab.*	C. Auſt.	*An.* 1112.	437	06	08
Miſſenden *Ab.*	Ben.	*An.* 1293.	261	14	06

CANTABR.

Thorney *Ab.*	Ben.	*An.* 972.	411	12	11
Barewel *Pr.*	C. Auſt.	*An.* 1092.	256	11	10

CESTR.

CESTR.

Monasteries.	Order.	Founded.	l.	s.	d.
St. Werburge *Ab.*	Ben.	*An.* 1095.	1003	05	11
Combermeer *Ab.*	Cist.	*An.* 1134.	225	09	07

CORNUB.

Bodmin *Pr.*	C. Aust.	*An.* 936	230	00	11
Launceston *Ab.*	C. Aust.	*T.* Will. Conq.	334	06	11
St. Germans *Ab.*	C. Aust.	*T.* K. Ethelstane.	243	08	00

CUMBR.

Carlisle *Pr.*	C. Aust.	*T.* Will. Ruf.	418	05	04
Holmcoltrom *Ab.*	Cist.	*An.* 1135.	427	19	03

DERB.

Darley *Ab.*	C. Aust.	*T.* Hen. II.	238	14	05

DEVON.

Ford *Ab.*	Cist.	*An.* 1133.	374	10	06
Newnham *Ab.*	Cist.	*Circ. An.* 1246.	327	07	08
Dinkeswel *Ab.*	Cist.	*An.* 1201.	294	18	08
Hertland *Ab.*	C. Aust.	*T.* Hen. II.	306	03	02
Torre *Ab.*	Præm.	*T.* Ric. I.	396	00	11
Buckfast *Ab.*	Cist.	*T.* Hen. II.	466	11	02
Plimpton *Ab.*	Cist.	*T.* Edw. II.	241	17	09
Tavestock *Ab.*	Ben.	*An.* 981.	902	05	07
Exon *Pr.*	Clun.	*T.* Hen. I.	502	12	09

DORSET.

Abbotsbury.	Ben.	*Circ. An.* 1016.	390	19	02
Middleton *Ab.*	Ben.	*by* K. Ethelstan.	538	13	11
Tarrent *Ab.*	Cist.	*by* Hen. III.	214	07	09
Shafton *Ab.*	Ben.	*An.* 941.	1166	08	09
Cerne *Ab.*	Ben.	*T.* K. Edgar.	515	17	10
Sherburn *Ab.*	Ben.	*Circ. An.* 370.	691	18	07

DUNELM.

St. Cuthbert *Ab.*	Ben.	*Circ. An.* 842.	1366	19	09
Tinmouth *Pr.*	Ben.		397	11	05

ESSEX.

Berking *Ab.*	Ben.	*An.* 680	862	12	05
Stratford Langthorn *Ab.*	Cist.	*An.* 1135.	511	16	03
Waltham *Ab.*	C. Aust.	*Circ. An.* 1060.	900	04	03
Walden *Ab.*	Ben.	*An.* 1136.	372	18	01
St. Oswith *Ab.*	C. Aust.	*An.* 1120.	629	03	03
Colchester *Ab.*	C. Aust.	*T.* Hen. I.	523	17	00

GLOUCESTER.

Monasteries.	*Order.*	*Founded.*	l.	s.	d.
Bristol *Ab.*	C. Aust.	*T.* Hen. I.	670	13	11
Hayles *Ab.*	Cist.	*An.* 1246.	357	07	08
Winchcomb *Ab.*	Ben.	*An.* 787.	759	11	09
Tewkesbury *Ab.*	Ben.	*An.* 715.	1598	01	05
Cirencester *Ab.*	C. Aust.	*T.* Hen. I.	1031	07	01
Kingswood *Ab.*	Cist.	*An.* 1139.	244	11	02
Glocester *Ab.*	Ben.	*An.* 680.	1946	05	09
Lanthony *Pr.*	C. Aust.	*An.* 1136.	648	19	11

HANTS.

St. Swithins Winton *Ab.*	Ben.	*An.* 634.	1507	17	02
Hyde *Ab.*	Ben.	*by* K. Alfred.	885	18	08
Wherwell *Ab.*	Ben.	*by* K. Edgar.	339	08	07
Romsey *Mon.*	Ben.	*An.* 907.	393	10	10
Taxinham *Pr.*	C. Aust.	*Ante* 1042.	312	07	00
Belloloco *Ab.*	Cist.	*An.* 1024.	326	13	02
Southwick *Pr.*	C. Aust.	*T.* Hen. I.	257	04	04
Tychfield *Ab.*	Præm.	*T.* Hen. III.	249	16	01

HERTFORD.

St. Albans *Ab.*	Ben.	*An.* 755.	2102	07	01

HUNTS.

St. Neots *Ab.*	Ben.	*Circ. T.* Hen. I.	241	11	04
Ramsey *Ab.*	Ben.	*An.* 969.	1716	12	04

KANC.

St. Austin's prope Cant. *Ab.*	Ben.	*An.* 605.	1413	04	11
Lesh. *Pr.*	C. Aust.	*An.* 1189.	362	07	07
Feversham *Ab.*	Cluni.	*An.* 1147.	286	12	06
Boxley *Ab.*	Cist.	*An.* 1144.	204	04	11
Rosten *Ab.*	Ben.	*Ad.* 600.	486	11	05
Malling *Abb.*	Ben.	*by* K. Edmund.			
Dertford *Ab.*	C. Aust.	46 Edw. III. per ipsum R.	380	00	00

LANC.

Whalley *Ab.*	Cist.	*An.* 1172.	321	09	01

LEIC.

Leicester *Ab.*	C. Aust.	*An.* 1143.	951	14	05
Croxden *Ab.*	Præm.	*Circ. T.* Ric. I.	385	00	10
Launde *Abb.*	C. Aust.	*T.* Will. Ruf.	399	03	03

LINCOLN.

LINCOLN.

Monasteries.	*Order.*	*Founded.*	£. s. d.
Lincoln *St.* Catharine *Pr.*	Gilb.	*T.* Hen. II.	302 05 00
Kirkstead *Ab.*	Cist.	*An.* 1139.	286 02 08
Revesley *Ab.*	Cist.	*An.* 1142.	387 02 04
Thornton *Ab.*	*C.* Aust.	*An.* 1139.	334 17 10
Bardney *Ab.*	Ben.	*An.* 712.	308 06 06
Croyland *Ab.*	Ben.	*An.* 716.	1803 15 10
Spalding *Ab.*	Ben.	*An.* 1052.	761 08 11
Sempringham *Ab.*	Gilb.	*An.* 1148.	317 04 01
Epworth *Mon.*	Carth.	19 Ric. II.	227 15 02

LOND. and *MIDD.*

St. John Jerusalem *Pr.*		*An.* 1100.	2385 12 08
St. Bartholo. Smithfield.	*C.* Aust.	*An.* 1102.	653 15 00
St. Mary Bishopsgate *Pr.*		*An.* 1183.	478 06 06
Clerkenwell *Pr.*	Ben.	*T. K.* Steph.	262 19 03
London *Minors.*	Ben.	*T.* Edw. I.	318 08 05
Westminster *Ab.*	Ben.	*T. K.* Edgar.	3471 00 02
Sion *Ab.*	*C.* Aust.	*by* Hen. V.	1731 08 04
London, *a House of*	Carth.	*T.* Edw. III.	642 00 04
St. Clare *without* Aldgate *Mon.*		*An.* 1292.	418 08 05
St. Mary *Charter-House.*	Carth.	*An.* 1379.	736 02 07
St. *John Hilowel.*	Mon. Nig.	*An.* 1318.	347 01 03
St. Mary East Smithfield *Ab.*	Cist.	34 Edw. III.	602 11 10

NORTHFOL.

Thetford *Ab.*	Clun.	*An.* 1103.	312 14 04
Wymondham *Ab.*	Ben.	*An.* 1139.	211 16 06
Hulmo *Ab.*	Ben.	*by K.* Canutus.	389 17 00
Westdertham *Ab.*	Præm.	*T.* Hen. II.	128 00 00
Walsingham *Ab.*	*C.* Aust.	*a. T. K.* Steph.	391 11 06
Castle-Acre *Ab.*	Clun.	*An.* 1090.	306 11 04
West-Acre *Ab.*	Clun.	*T.* W. Rufus.	260 13 07

NORTHTON.

Burgi *St.* Petri *Ab.*	Ben.	*by* Rosera R. Merc.	1122 14 00
Pipewel *Ab.*	Cist.	*An.* 1143.	286 11 09
St. Andrews *Pr.*	Clun.	*An.* 1087.	263 07 01
Sulby *Ab.*	Præm.	*T. K.* Steph.	258 08 05

NOTTS.

Monasteries.	Order.	Founded.	l.	s.	d.
Lenton *Pr.*	Clun.	*T.* Hen. I.	329	05	10
Thurgarton *Pr.*	*C.* Auſt.	*T.* Hen. I.	259	09	04
Welbeck *Ab.*	*C.* Auſt.	*T. K.* Steph.	249	06	03
Warſop *Pr.*	*C.* Auſt.		239	10	05
Bella Valla *Pr.*	Carth.	*c.* 16 Edw. III.	227	08	00
Newſteed *Pr.*	*C.* Auſt.	*T.* Edw. III.	219	18	08

The Two laſt are under Value in Mr. *Dugdale*, but thus *per Speed.*

NORTHUMBR.

Tinmouth *Nunnery*,	*a Cell to St.* Albans.		511	04	01

OXON.

Godſtow *Ab.*	Ben.	*T. K.* Steph.	274	05	10
Eyneſham *Ab.*	Ben.	*by K.* Ethelred.	441	12	02
Oſney *Ab.*	*C.* Auſt.	*T.* Hen. I.	654	10	02
Thama *Ab.*	Ciſt.	*T.* Hen. I.	236	13	11
Oxford *Pr.*	*per* Speed, *fund. ante Conq.*		224	04	08
Dorcheſter *per eund. Ab.*	*C.* Auſt.	*An.* 635.	219	12	00

SALOP.

Haghmond *Ab.*	*C.* Auſt.	*An.* 1100.	259	13	07
Lilleſhull *Ab.*	*C.* Auſt.	*per* A. d'Elfleda, R. Mercix.	229	03	01
Wigmore *Ab.*	*C.* Auſt.	*An.* 1172. *per Speed*	267	02	10
Wenlock *Pr.*	Clun.	*An.* 1181. *vel antea*	401	00	07
Salop *Ab.*	*C.* Auſt.	*An.* 1081. *per Speed.*	615	04	03
Hales Owen *Ab.*	Præm.	*T. K.* John.	331	15	06

SOMERSET.

Glaſſenbury *Ab.*	Ben.	*Circ. An.* 300.	3311	07	04
Brewton *Ab.*	*C.* Auſt.	*Circ. T.* W. Conq.	439	06	08
Henton *Pr.*	Carth.	*T.* Hen. III.	248	19	02
Witham *Pr.*	Carth.	*by* Hen. II.	215	15	00
Taunton *Pr.*	*C.* Auſt.	*T.* Hen. I.	286	08	10
Bathon *Ab.*	Ben.	*T.* Hen. III.	617	02	03
Keyneſham *Ab.*	*C.* Auſt.	*T.* Hen. I.	419	14	03
Michelney *Ab.*	Ben.	*An.* 740.	447	04	11
Buckland *Pr.*	Ciſt.	*T.* Edw. I.	223	07	04

STAFF.

Dela Cres *Ab.*	Ciſt.	*An.* 1153.	227	05	00
Burton *ſuper* Trent *Ab.*	Ben.	*T. K.* Eadred.	267	14	03
Croxden *Ab.*	Ciſter.				

SUFFOLK.

SUFFOLK.

Monasteries.	*Order.*	*Founded.*	£	s.	d.
St. Edmundsbury *Ab.*	Ben.	*An.* 1020.	1659	13	11
Butley *Ab.*	C. Aust.	*An.* 1171.	318	17	01
Sibeton *Ab.*	Cist.	*An.* 1150.	250	15	07
Ixworth *Pr.*	C. Aust.	*T.* Will. Conq.	280	09	05

SURRET.

Merton *Pr.*	C. Aust.	*An.* 1414.	957	19	05
Shene *Pr.*	Carth.	*An.* 1414.	777	12	00
Chertsey *Ab.*	Ben.	*An.* 666.	659	15	08
Newark *Pr.*			258	11	11
St. Mary Overs *Ab.*	C. Aust.	7 Hen. I.	625	06	06
Bermundsey *Ab.*	C. Aust.	7 Hen. I.	474	14	04

SUSSEX.

Lewis *Ab.*	Clun.	*T.* W. Ruf.	910	04	06
Roberts-Bridge *Abbey.*	Cist.	*T.* Hen. II.	148	10	06
Battaile *Ab.*	Bl. Monks.	*An.* 1066.	987	00	11

WARW.

Combe *Ab.*	Cist.	*T.* K. Steph.	311	15	01
Kenelworth *Ab.*	C. Aust.	*T.* Hen. I.	338	19	00
Meryval *Ab.*	Cist.	*An.* 1148.	254	01	08
Nuneaton *Mon.*	Ben.	*T.* Hen. II.	253	14	05

WILTS.

Malmsbury *Ab.*	Ben.	*Circ. An.* 670.	803	17	07
Bradenstock *Pr.*	C. Aust.	*T.* Will. Conq.	311	19	05
Edington *Pr.*	C. Aust.	*An.* 1352.	442	19	07
Ambresbury *Ab.*	Ben.	*An.* 1177.	498	15	05
Wilton *Ab.*	Ben.	*T.* K. Ethelwolf	621	01	01
Faireley, *a Cell to* Lewis	Clun.	*An.* 1125.	117	00	04
Laycock *Ab.*	C. Aust.	*An.* 1232. *per* Speed	183	12	05

WIGORN.

Malverne *Ab.*	Ben.	*An.* 1083.	308	02	05
Evesham *Ab.*	Ben.	*T.* K. Offa.	1185	12	09
Pershore *Ab.*	Cist.		683	04	05
Hales Owen *Ab.*	Prem.	*T.* K. John.	282	13	04
Bordesly *Ab.*	Cist.	*An.* 1138.	388	01	01

EBORUM.

St. Mary Ebor. *Ab.*	Ben.	a Will. Ruf.	1550	07	06
Selby *Ab.*	Ben.	*T.* Will. Conq.	710	13	10

Kirkdal

A List of Abbies, Monasteries, &c.

Monasteries.	Order.	Founded.	l.	s.	d.
Kirkstal *Ab.*	Cist.	*An.* 1147.	329	02	11
De Rupe *Ab.*	Cist.	*An.* 1147.	224	02	05
Monks Burton *Ab.*	Clun.	*Circ. An.* 1186.	239	03	06
Nostel *Ab.*	C. Aust.	*T.* Hen. I.	492	18	02
Pomfrait *Ab.*	Clun.	*T.* Will. Conq.	237	14	08
Gisbourn *Ab.*	C. Anst.	*T. K.* Steph.	628	03	04
Whitby *Ab.*	Ben.	*T.* Will. Conq.	437	02	09
Montegratiæ *Ab.*	Carth.	*Circ. An.* 1396.	323	02	10
Newburge *Pr.*	C. Aust.	*An.* 1145.	367	08	03
Belland *Ab.*	Cist.	*An.* 1134.	238	09	01
Kirkham *Ab.*	C. Aust.	*T.* Hen. I.	269	05	09
Melsa *Ab.*	Cist.	*An* 1136.	299	06	04
Brilington.	C. Aust.	*T.* Hen. I.	547	06	11
Walton *Ab.*	Gilb.	*T. K.* Steph.	360	16	10
Bolton in Craven *Pr.*	C. Aust.	*T.* Hen. I.	212	03	04
Rival *Ab.*	Cist.	*An.* 1132.	278	10	02
Jerval *Ab.*	Cist.	*T. K.* Steph.	234	18	05
Furnes *Ab.*	Cist.	*An.* 1127	805	16	05
De Fontibus.	Cist.	*An.* 1132.	998	06	08
Warter *Pr.*	C. Aust.	*T.* Hen. I.	221	03	10
Richal, *per* Speed.			351	14	06
Old Maulton *Ab.*		*T. K.* Steph. *per* Speed.	257	07	00
St. Michael *near* Hull.	Carth.	*An.* 1377.	231	17	03

WALLIA.

Valle de Sancta Cruce *Com.* Denbeigh.	Cist.	*T.* Edw. I.	214	03	05
Strata Florida Cardiganshire.	Cist. *or* Clun.	*T.* Will. Conq.	1226	06	00

Note; It has been resolved, That Abbey Lands within *London*, and the Liberties thereof, are not freed from the Payment of Tithes within the said Stat. 31 *H.* 8. because the Statute and Decree for Payment of Tithes in *London*, and its Liberties, were made after the said Stat. 31 *H.* 8. and their Privileges are not thereby reserved. See *Cro. El.* 376. *Moor* 912.

FINIS.

